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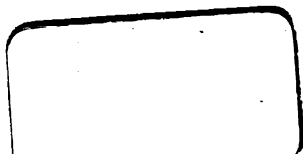
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A  
**SUMMARY**  
OF THE  
**POWERS AND DUTIES**  
OF A  
**JUSTICE OF THE PEACE**  
**IN SCOTLAND,**  
WITH  
**FORMS OF PROCEEDINGS, &c.**  
COMPRISING A SHORT VIEW OF THE CRIMINAL DUTY, AND OF  
THE GREATER PART OF THE CIVIL DUTY, OF  
**SHERIFFS AND MAGISTRATES OF BURGHS.**

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By **GEORGE TAIT, Esq. ADVOCATE.**

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THE FOURTH EDITION, ENLARGED AND IMPROVED.

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**EDINBURGH:**  
PRINTED FOR JOHN ANDERSON & CO. 295, ROYAL EXCHANGE,  
AND LONGMAN, REES, ORME, BROWN, & GREEN,  
LONDON.  
*Alex. Smellie, Printer to the University.*  
1828.



# PREFACE.

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THE Author was lately induced to write a short treatise on the Duty of a Constable, from its being suggested that the information on that subject, in the existing treatises, was not adapted for immediate reference, particularly for persons not accustomed to legal investigation. Having been thus led to look into the information on the duty of a Justice of the Peace in this country, contained in the law writers, it appeared to be liable to the same objections. He was therefore induced to attempt, from the statutes, decisions, and institutional writers, a condensed methodical view, without disquisition or speculation, of some of the principal doctrines on the subject, more, at first, for his own information, and as a useful exercise, than with any serious intention of publication. Upon putting his name to the Duty of a Constable (for the first edition was anonymous) a wish was expressed, both anonymously and by friends of experience at the bar, that he should attempt a treatise on the duty of Justices. He therefore extended his object; and devoted to it all his leisure. And he now offers to the public the result of his attempt (for which he trusts a sufficient apology has been made) with that deep conviction of fallibility which the deliberate investigation of a subject necessarily produces.

The difficulties which have occurred have been far beyond his expectation. One great difficulty has arisen in attempting to distinguish what statutes extend to Scotland; of the magnitude of which it is sufficient to mention, as an example, that in one case (Duke of Douglas against Lockhart, 18th December 1753, see *Justices of the Peace*, last note) the Court of Session first found that a certain statute, very important to Justices, extended to Scotland, then that it did not, then twice that it did; and that the House of Lords, on appeal, reversed the last judgment. He may mention that, in the case of statutes applicable to the subjects in this Summary, which seemed not to extend to Scotland, he has thought it sufficient in general, for the sake of brevity, simply to omit them; but that where he has been aware of decisions of the Supreme Courts, or differences and doubts among legal authorities, as to the extension of a statute, he has noticed it under its proper head. See *Justices*, last note.—*Vagabonds*, last note.—*Fishing*, last note.—*Planting*, last note.—*Gaming*, note, &c. He may also mention that, where acts of Parliament have been repealed, or have become obsolete, *e. g.* many acts with regard to *game*, he has, in general, for the sake of brevity, passed them in silence.

He has endeavoured to avail himself of every source of information to which he had access. In the criminal department, he has been infinitely indebted to Mr BARON HUME's invaluable Commentaries (*a*). He has searched the Books of Adjournal (as the records of the Court of Justiciary are called) for some time back; and has gathered a good deal of information from the criminal cases brought under review from inferior courts. He has observed several recent cases in the Court of Session. He has received important information, on several points of practice, from diffe-

(*a*) In this edition, he cites the second edition of Mr Baron Hume's commentaries. The references are by the volume and page.

rent sheriffs, justices, and clerks of the peace. The legal articles have been revised by some of his brethren, of great experience, and of high consideration at the bar; and other articles by persons of practical knowledge in them; to all of whom he offers grateful acknowledgments. But still there must be errors; and (though he has searched widely for subjects, and has treated of many not before presented to the public in a work of this description) there must be omissions. He will be very grateful to have such pointed out to him.

He has made it a general rule to refer to authorities for the doctrines advanced. As he may, however, sometimes have misunderstood them, he hopes that an error will not be imputed to the authority till it be ascertained that the doctrine is correctly cited.

One of his principal objects has been compression. Many passages have been struck out, and some articles more than once transcribed, in order to make way for more practical matter, without increasing the length of the treatise. He has generally been fullest on those articles on which information must be gathered from an extensive range of statutes and authorities, or in which Justices may be called upon to act suddenly, singly, upon important occasions, or under the risk of exposing themselves to prosecution.

After much deliberation, and notwithstanding the attachment to systematic order, produced by legal habits, an alphabetical arrangement has been preferred, as being best adapted for reference. Each article forms a short independent treatise; and is methodically arranged. In one or two cases, he has been forced to use technical names for articles where no other name would properly express the meaning; *e. g.* *Nautæ, Caupones, Stabularii*. But in those cases ordinary names

are inserted in the Index, with references to the technical names, *e. g.* Stablers, see *Nautæ*, &c. Any questionable choice of names for the articles in general, is obviated by the Index.

It is recommended that Justices of the Peace should read the article *Justices of the Peace*, before consulting any other. Those (if there be such) who wish to *peruse* the summary, may, for the criminal department, read *Crimes in general*, the different crimes, *Arrest, Bail, Surety, Process, Proof*, &c. ; for the civil department, *Children*, sect. Unlawful, and *Servant*, to both of which Justices are competent, independently of the small debt act ; then *Small Debt Act*, and the different contracts, &c. falling under it : then *Process, Proof*, &c. ; and then the miscellaneous articles.

Forms of proceedings are inserted for matters of ordinary occurrence. It has not been attempted to give forms for all possible emergencies. But it is easy to vary those given, according to circumstances, or to frame others when required. All that is necessary is that the proceeding or warrant be perspicuous, short, rational, and consistent with the law upon the point.

An Index is subjoined, including a Table of the Titles, with their subdivisions (for it was thought expedient, in a treatise alphabetically arranged, to throw these into one), the titles being distinguished by being printed in capital letters. At the end of many articles reference is made to relative articles.

Though written chiefly for Justices of the Peace, this summary necessarily comprehends a short view of the criminal duty, and of the greater part of the civil duty, of SHERIFFS and MAGISTRATES of BURGHS. The *extent* of their jurisdiction, however, differs in some points from that of Justices.

*Sheriffs and Stewarts* (for they differ only in name) try not only for the smaller offences for which justices try, but also for the higher offences. The extent of their jurisdiction is stated in Mr Baron HUME's Commentaries, (*a*) which will of course be consulted in any trial of importance. It is, in an especial manner, their duty to arrest and precognosce for the higher crimes. In civil matters, they judge in a great variety of questions, most of which it has been necessary to insert in this summary, on account of the jurisdiction of Justices under the small debt act.

*Magistrates of Royal Burghs*, as such, have power to repress the inferior transgressors against the quiet, police, and good order of the town. In several points, the application and precise extent of their jurisdiction is very liable to controversy; but it has not been customary anywhere that trials of much consequence have been brought before them (*b*). As to arrest and precognition, they seem to be in the same situation as Justices (see *Arrest*, &c.) In civil matters, their jurisdiction is generally understood to be as extensive within burgh as that of a Sheriff (*c*). In some of the greater burghs, the Magistrates are, by special grant, vested with the power of Sheriffs within the burgh; in some, of Justices of Peace within the burgh: and it has been the custom, since the Union, to insert one or more of the Magistrates of each royal burgh in the commission of the peace for the county.

*Magistrates of boroughs of regality, or of barony*, which were independent of the lord of regality or baron in 1747 (for the jurisdiction of Magistrates of such boroughs which were not then independent, unless where the superior was the corporation of a royal burgh, is taken away) seem to

(*a*) Particularly, Hume, ii. 58-67.

(*b*) Hume, ii. 67.—Erskine, i. 4. 21.

(*c*) Ersk. *ibid*.

differ little or nothing in point of jurisdiction from those of royal burghs as such (*a*).

With regard to *Barons*, &c. and their *Bailies*—it may be mentioned, that heritors whose lands were erected into a barony by the crown, or were granted *cum fossa et furca*, or with power of pit and gallows, or equivalent words, had anciently capital jurisdiction within their bounds, and that heritors infeft *cum curiis* had a lower degree of jurisdiction : but it having been found expedient to regulate the jurisdiction of persons having the right of barons, or other lower jurisdiction, they and their bailies were limited in criminal matters to assaults, batteries, and smaller offences, and to a fine of 20s. sterling, or to setting in the stocks for three hours in the day time ; the fine to be recovered by poinding, or by imprisonment, not exceeding a month ; and in civil matters to 40s. sterling (*b*). They must enter their prison in the Sheriff's books, and it must have windows or grates open to inspection from without (*c*). When they commit for trial for the smaller crimes, it must be by written warrant, expressing the cause ; the warrant to be entered at large in a book, of which extracts to be transmitted every six months to the Sheriff (*d*). Their proper jurisdiction is the recovery of the baron's maills and duties, profits and rents, multure and mill services ; in which they are not limited to 40s. (*e*). And the erection of lands into a barony, lordship, earldom, or other denomination, since 6th June 1747, gives no other jurisdiction (*f*). BARON HUME doubts whether the Barons and their Bailies, though limited in the description and pu-

(*a*) 20 Geo. II. c. 43, sect. 27.—Maxwell against M'Arthur, 16th December 1775.—Magistrates of Paisley against Adam, 30th November 1792.—Sheriff-clerk of Renfrewshire against Town of Greenock, 27th May 1794.—Graham, 27th February 1805.—Dowie against Douglas, 30th May 1817.

(*b*) 20 Geo. II. c. 43, sect. 17.

(*c*) Sect. 18.

(*d*) Sect. 19.

(*e*) Sect. 17.

(*f*) Sect. 25.



nishment of the offences for which they can try, may not grant warrant to apprehend for the higher crimes, at least to the effect of carrying the offender before the nearest justice within their bounds, or of keeping him in custody, or of imprisonment in the barony jail in the meantime, till the higher Magistrate shall be informed of the charge (*a*).

In a few particulars of a criminal complexion, *e. g.* recovering penalties and forfeitures under the revenue laws, Justices have a jurisdiction exclusive of other Magistrates; but it will be seen, by looking at the proper article, when this is the case (*b*).

The concise view of many interesting parts of the law, both civil and criminal, of daily application, which this Summary contains, may be useful to PRIVATE PERSONS.

The Author shall consider himself amply rewarded for his labour, if the following pages shall be found of any material use.

(*a*) Hume, ii. 74.

(*b*) *Note.* At the end of the article *Justices of the Peace*, sect. Particulars not in Commission, there are some observations on the powers of judges in general beyond their territory, and of their responsibility for their official acts.

*Edinburgh, 28th February 1815.*



A

# SUMMARY

OF THE

## POWERS AND DUTIES

OF A

## JUSTICE OF THE PEACE, &c.

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### AFFIDAVIT.

AN affidavit is a declaration on oath, of the truth of certain facts, before a judge. There are various cases in which a justice of the peace is authorized and required to receive an affidavit; such as oaths of verity upon debts in bankruptcies, in applications for *meditatio fugæ* warrants, &c.; oaths by officers of the army and navy to enable them to draw half-pay, and by discharged soldiers to enable them to draw their pensions; judicial ratifications by married women, &c.

Sometimes a person desires to emit an affidavit not required or acknowledged by law. This is "at least an useless, or rather an improper practice, for this, if for no other reason, that it tends to lessen the reverence of an oath, by the free tendering of it at pleasure, and on every frivolous occasion" (*a*).

An affidavit may be taken by a judge beyond his jurisdiction. (See *Justices*, sect. Particulars not in Commission or Oath).

#### FORM OF AFFIDAVIT.

" At                      the                      day of                      one thousand  
 " eight hundred and                      years, In presence of A. B.  
 " Esq. of C. one of his Majesty's justices of the peace for the  
 " county of

(*a*) Hume, 2d edit. vol. i. p. 364.

"Compeared D. E." [design him] "who being solemnly  
 "sworn, depones, That" [insert the facts]. "All which is  
 "truth as he shall answer to God."

"D—— E——

"A—— B—— J. P."

### ALEHOUSES.

No person can directly or indirectly "keep any alehouse, "tippling-house, or victualling-house, or sell ale, beer, spirits, "strong waters, or other exciseable liquors, by retail," unless he have received a licence, or certificate as it is commonly called, from justices or magistrates, under the act cited, authorising them to grant such (*a*).

Magistrates of burghs, or two of them, must meet to grant licences on 15th May yearly, or the next lawful day thereafter. If there be not a sufficient number of magistrates capable at that time, the justices of the peace of the shire or stewartry in which such borough is situated, may grant licences to such and so many persons as they shall think proper, at the same time, and in the same manner as they are empowered to do for their shires and stewartries; which are to continue in force till the next annual day for granting licences, according to this act (*b*).

The justices of the peace in every shire and stewartry in Scotland must meet annually in their shires and stewartries on 22d May, or the next lawful day thereafter, at the hour and place when and where the general quarter sessions for such shire or stewartry have usually been held; and, at such annual meeting, must license for the year ensuing "such and so many "persons as the major part of the justices then assembled shall "think meet and convenient, to keep ale-houses, tippling-houses, victualling-houses, or to sell ale, beer, or other "exciseable liquors, by retail," within such respective shire or stewartry, or, in the event before mentioned, within any royal burgh or burghs situate in such shire or stewartry; and those justices must deliver, or cause to be delivered, to each person so licensed by them, a licence signed by the preses of the meeting, and by the clerk of the peace of the shire or stewartry (*c*). There is a form of a licence given in one of the excise acts (*d*).

If the magistrates of any royal burgh, or the justices of the peace of any shire or stewartry, neglect to meet as above pre-

(*a*) 44 Geo. III. c. 55, sect. 5.    (*b*) Sect. 6, 7.    (*c*) Sect. 8.  
 (*d*) 48 Geo. III. c. 143.

scribed, for granting licences, the clerk of the burgh, shire, or stewartry respectively, or his lawful deputy, after making an entry or record that the magistrates or justices had neglected to assemble in pursuance of this act, must give a licence to any person applying for it, if not disqualified (a).

The magistrates or justices may, if they find it necessary, adjourn to the next lawful day, and no longer; and, if they shall not then completely dispose of all the applications for licences, the clerks must in like manner grant licences: but can only do so within three days following the days appointed for the magistrates or justices (b).

No justice or magistrate, who is a brewer, maltster, distiller, or retailer of ale, beer, or other exciseable liquors, or is concerned in partnership, or otherwise, with any brewer, maltster, distiller, or retailer of ale, beer, or other exciseable liquors, can act as a justice or magistrate in any meeting for granting licences, under a penalty of L.50 (c).

Those applying for a licence produce a certificate from the minister of the parish, or from some of the elders, or from some householders known to the court, with regard to their good character. Those who have had a licence generally get it renewed, of course, on their application, if no objection be made.

The justices refuse licences if the applicant be of bad character, and a *caveat* lodged against him; and sometimes, where the house is situated so as to give an undue incitement to dissipation, as near barracks or manufactories, particularly if any objection be stated by those interested (d).

Even after a person has obtained a licence in the manner now described, he is not entitled to open an alehouse till he have obtained an *excise* licence for that purpose, upon payment of a certain duty, and upon production of the licence by the magistrates or justices of peace (e): the particulars with regard to which fall under the details of the jurisdiction of justices in excise matters; and for which the statutes in force for the time must be consulted.

The manner in which a person is punished for keeping an alehouse, &c. without a licence from the justices, is by imposing a penalty upon him under the excise laws for the want of an excise licence, which cannot be obtained without producing the former; and the act which has been cited does not appear

(a) 44 Geo. III. c. 55. sect. 12.

(b) Ibid. sect. 13.

(c) Sect. 21.

(d) Hutcheson's Justice of the Peace, 3d edit. vol.

iii. p. 385.

(e) 48 Geo. III. c. 143.

to contemplate any other punishment than this, which is found to be effectual.

It has been found in England that innkeepers must (unless they have reasonable excuse) receive all guests who come (*a*) and tender ready money (*b*); and that otherwise they are liable in damages, and may be fined (*c*); that they must receive a horse, though the owner do not lodge in the house; though it might be otherwise of a trunk or other dead thing, by keeping which they have no gain (*d*). It seems to be the general understanding that the same is the law in Scotland. It was in some measure admitted in the argument in a late case with regard to lightermen (*e*). Perhaps refusal might authorize the justices to impose a fine as for a breach of public police. It might, in a strong case, be a ground for their refusing to renew the licence. But, in general, the interest of innkeepers will be a sufficient inducement for them to perform their duty in this respect.

See *Spiritous Liquors*.—*Excise and Customs*.—*Sedition*, sect. Unlawful Societies.

#### APPRENTICES.

A PERSON becomes an apprentice by a written, formal, and duly attested engagement, called an indenture, in which the master becomes bound to teach his trade, and sometimes to afford board, sometimes to pay wages; and the apprentice becomes bound to obey and serve the master as such, during the stipulated number of years, and sometimes to advance a fee to the master for his trouble. When there is any material informality in the deed, either party may resile, unless the service have been entered upon and continued for some time (*f*).

Justices of the peace are competent, under the small debt act, to pecuniary claims by either party, arising under this contract. They seem competent, independently of the small debt act, to actions by apprentices against masters for wages due to them as servants. (See *Servants*.) (*g*).

(*a*) 3. Burrows, 1501.—Burn. (*b*) Dyer's Reports, 158.—Burn.

(*c*) Dalton, c. 7. (*d*) 1. Salk. Reports, 388.—Burn.

(*e*) Campbell against Kerr, February 24. 1810.

(*f*) Rymer against M'Intyre, 19th July 1781.

(*g*) A series of enactments have been passed, giving to justices of the peace power to regulate apprentices, servants in husbandry, artificers, labourers, and others, to enforce implement of their engagements, and to recover the wages due to them; the most important of which appear to be the acts 5 Elizabeth, c. 4; 1 James I. c. 6; 20 Geo. II. c. 19; 31 Geo.

At common law, apprentices cannot enlist as soldiers (*a*); but this is commonly modified by the annual mutiny act. (See *Soldiers*, sect. Enlisting.) Neither can they, at common law, enter into the navy (*b*), unless they formerly used the sea (*c*). (See *Seamen*, sect. Impressing.)

For the special powers conferred by statutes on justices as to servants in manufactures, see *Manufactures*.

For compelling apprentices by imprisonment to return to their service, see *Imprisonment*.

## ARREST, DECLARATION, AND PRECOGNITION.

THIS article relates to the powers and duties of Justices of the Peace in securing persons suspected to be guilty of any cognizable crime (such as is not of so venial a nature as to make it proper to begin with citation of the accused, see *Process*), but particularly of any of the higher crimes, for which they themselves cannot try, or ought not to try; and in preparing cases of the higher crimes for trial in the supreme court. Those powers and duties they have both under the general act 1661, c. 38, and under their commission. (See *Justices of the Peace*).

The arresting or apprehending the accused is ordinarily the first step; that is followed by taking his declaration; and that, in the case of the higher crimes, by instituting a precognition, and by making regular presentment of the crime, or at least furnishing the agent for the Crown with the proper materials for a trial. Those different steps shall be considered in their order. It was thought more proper to present them in one connected view than to scatter them through the treatise, as a strict alphabetical order would require.

It must be premised, that, although a justice of the peace is entitled to conduct precognitions from beginning to end, and transmit them (by the procurator-fiscal or the clerk of the peace) when finished, to the agent for the Crown, and some-

II. c. 11; 6 Geo. III. c. 25; 4 Geo. IV. c. 29; 4 Geo. IV. c. 34. Some of those acts were passed by the English Parliament prior to the union of the two kingdoms, and, therefore, cannot extend to Scotland. And it appears that none of them extend to this country. A series of enactments has also been passed with regard to parish apprentices; but these are part of the English system of the poor laws, and do not extend to Scotland.

(*a*) Wright against Lumsden, 29th June 1742. Clerk Home.

(*b*) Cunningham and Simpson against Sir George Home, 19th January 1796.

(*c*) Turnbull and M'Donald against Sir George Home, 26th June 1793. —Cunninghame and Simpson, *supra*.

times does so, yet this duty has usually been allowed to fall into the hands of the sheriff. And if there be no risk of losing evidence by the delay, or any particular reason to the contrary, it may, in the general case, be preferable for the justices to go no farther than (after examining him, which will generally be proper, see sect. Arrest, and sect. Declaration) to commit the accused for farther examination, and to leave the rest to the sheriff. In this case, the justice (where the procurator-fiscal of his court is not also procurator-fiscal of the sheriff-court, which, however, he very often is) causes intimation to be made by his procurator-fiscal, or otherwise, to the procurator-fiscal of the sheriff-court, so that the accused may not be detained longer in prison than necessary, by a delay in carrying on the investigation of the case. In minor offences, and at a distance from the county town, it is often convenient that justices should take a precognition. It is, in general, advisable, however, on finishing the precognition, that they should not commit for trial (see *Commitment for Trial*) but should only commit for further examination, and transmit the culprit to the jail of the county town, and the precognition, so far as taken, to the procurator-fiscal of the sheriff-court, that he may, if necessary, get the culprit farther examined, and get farther precognition taken.

It seems proper to observe, that, as the sheriff can try for many crimes for which justices cannot, criminals, whom they arrest, examine, &c. may often be tried before him, and not before the supreme court.

#### I. ARREST.

Whenever any traces are got of a person who has committed a crime within the jurisdiction of a justice of the peace, particularly one of the higher crimes, measures ought to be taken for arresting him. This arrest takes place, either, 1. Without a warrant, or, 2. With a warrant.

##### 1. *Without a warrant.*

Any justice of the peace, or other magistrate, who has knowledge of a felony, or even of a riot or breach of the peace, by seeing it committed in his presence, may straightway himself arrest the offenders (*a*). He may require private persons to assist him (*b*).

The powers of a Constable and of a private person, in arrest-

(*a*) Hume, II. 72.

(*b*) 1661, c. 38.



ing without a warrant, have been explained in the author's treatise upon the powers of a Constable.

## 2. *With a warrant.*

(1.) *Verbal warrant.*—Sometimes the warrant is merely verbal, from the necessity of the case. In the situation just mentioned, the justice of the peace, or other magistrate, may, by a verbal order, authorise orders to arrest the delinquents, who may follow the delinquents thus pointed out to them, though not named (for it may be impossible immediately to learn their names) and execute this order upon them, out of the presence of such magistrate, if they flee. Nay, though the deed have not been done under the eye of the magistrate, yet still, if an immediate complaint be made to him of a murder, robbery, or other the like violent and atrocious crime, by those who have certain knowledge of the fact, and of the person of the offender; this too, in so urgent a case, is a sufficient justification of a verbal order to the informer and others to pursue and take the individual thus positively charged, who might escape through the delay of waiting for a written warrant (a).

(2.) *Written warrant.*—The warrant is always in writing, where that can be accomplished without great risk of allowing the guilty person to escape.

A justice of the peace, or other magistrate, may grant warrant for his bounds, upon due information of any crime, though it be one of that degree of which he cannot himself take cognizance to the effect of trial and punishment, as *Murder, Robbery, &c.* (b).

Though it may be adviseable in many cases to take the oath of the informer, or person upon whose application the warrant, whether for apprehending a delinquent, or for searching for stolen goods, is applied for, yet that has not been customary in this country, even on the application of a private individual. And though it is very proper, where it can be done, to support the warrant with a written petition or examination of the person applying for it, this is not indispensable (c).

A warrant to apprehend ought to be dated, and must be signed by the magistrate in whose name it runs; and “if it be from a justice of the peace, it ought regularly to bear his style and quality, and the county for which, as well as the place, where it is given; all which things are more especially

(a) Hume, ii. 72.

(b) Ibid. ii. 74.

(c) Ibid.

“proper to be observed, if the warrant be a separate warrant, “given *de plano*, without reference to any written application “which may serve to explain these particulars.” But the want of none of these things, except the subscription of the granter, seems to be an absolute nullity (*a*); though they ought, as far as possible, to be observed. In like manner, though it is undoubtedly the safer and more advisable course to express in the warrant the special cause for which it is given, yet it does not appear that the officer can be justified in refusing to execute, or the party in resisting, a more general warrant, which orders him to answer to such matters as shall, on examination before the magistrate, be laid to his charge (*b*). But it is a different and far more exceptionable warrant which is general as to the person charged, and commands the bearer to apprehend all persons suspected of the matters there set forth, or to make search every where for stolen goods, or the like; for, under a writ of this shape, every thing is committed to the temper, judgement, and discretion of the officer; which is very dangerous, and may prove the occasion of great abuses. And, though there have been no purpose to grant a general warrant, yet still if it happen, *per incuriam*, that the writing omits, either *in gremio*, or by some plain and intelligible reference, to specify the person against whom it issues, it seems not to be a safe or lawful ground for taking any one (*c*).

The warrant may either be to bring the party before the granter himself, or before some other competent magistrate for the bounds, (whom it is better to name) (*d*), for examination. It is not unlawful, however, where the magistrate has strong grounds of suspicion against the prisoner, or where, for some true and substantial reason, he cannot previously be examined, to grant warrant *de plano* to commit him to jail (*e*) for examination. But it appears to be proper that the magistrate should examine him as soon as circumstances permit. The warrant may be addressed either generally to the proper officers of the granter, or particularly to a certain messenger, macer, sheriff officer, constable, or the like; or even, in case of need, to a private person, who thereby becomes an officer for the occasion; and, if he observe all the precautions necessary in such

(*a*) Hume, ii. 75.

(*b*) Ibid.

(*c*) Ibid.—2. Hale's Hist. 113, 150.—2. Hawk. 82, 84. It appears that where the name of the culprit cannot be learned, it may be sufficient to give as full a description of him as can be procured; such a description as points him out in a reasonable way, and prevents the warrant from being a general warrant.

(*d*) Hume, ii. 75.

(*e*) Ibid. 77.

a case, in his way of carrying the warrant into execution, shall enjoy the privileges and protection of that character (*a*). It seems, however, to be prudent not to make use of a private person, if it can be avoided, lest he should not properly discharge his duty. The warrant cannot be addressed to a party. (See Oath in *Justices*.)

Where the warrant is for committing the person under such circumstances, it ought to bear *for examination*. It ought in no case to be left doubtful whether the warrant be for commitment for examination, or for custody in order to trial (*b*). (See *Commitment for trial*.)

Warrants to commit for examination, or for farther examination, are in the same situation with regard to date, subscription, &c. as warrants to arrest.

When any person suspected of a crime absconds or escapes from justice, his description ought to be immediately drawn up, forwarded to the magistrates of the nearest towns, and especially to the principal magistrates or officers of the law at the sea-ports nearest adjacent, with a request for their assistance to apprehend the criminal. A like description ought to be forwarded to Edinburgh to the crown agent, that it may be advertised (*c*).

### 3. *Crime beyond Territory.*

A subject of considerable difficulty and delicacy is now to be noticed, viz. What is the power of a justice of the peace, or other inferior magistrate, to arrest a person found within his jurisdiction, for a crime committed out of his jurisdiction.

The crime may have been committed, 1. In another county of Scotland: 2. In some other part of the united kingdom: 3. In some foreign country.

(1.) *In another part of Scotland.*—It is considered in another place (*Forum*) how far a person can be tried by the local judges of one county for an offence committed in another county. With regard to the arresting a criminal in one county, in order to his being tried or precognosced for the offence in another county, in which he committed the crime, the regular and ordinary course is this. “If the party have fled, the remedy is “to get the warrant (which had been granted by a judge of the “place where the crime was committed) indorsed by some ma-

(*a*) Hume, li. 75.

(*b*) Burnet, 326.

(*c*) Rules for taking precognitions, &c. drawn up in 1765 by the agent for the Crown and the depute-clerk of the Court of Justiciary, and revised by Lord Hailes; and published by Baron Hume, Com. vol. li. App. No. 9.

“gistrate of the shire to which he has gone ; and this is good, “by custom, though it be a justice of the peace who indorses “the sheriff’s warrant, or a sheriff who indorses that of a “justice of the peace.” “When indorsed in this course, “the warrant may equally be executed by the officer who “brought it, or by the officers of the county or place “where it is indorsed.” (a). But it must often happen that a warrant cannot be obtained from a judge of the territory in which the crime was committed, in order to be backed, without giving the culprit an opportunity of escaping ; and the question occurs, Whether it is competent for a judge of the territory in which the culprit is known to be, to grant warrant for arresting him, with a view to his being afterwards regularly transmitted to the proper territory. This, it is believed, is done by all classes of inferior judges. The judge of the territory in which the criminal is, upon the application of his own procurator-fiscal, or of the private party concerned, stating the offence, grants warrant to arrest, and then, if it seem proper after examining the accused, commits for farther examination. Notice is immediately sent to a procurator-fiscal of the territory in which the crime was committed, who obtains warrant to arrest, from a judge of that territory, or the private party obtains it ; this is backed by a judge of the territory in which the criminal is detained ; and upon this backed warrant the criminal is given over to the officers to be transmitted. If such warrant do not arrive in a reasonable time, the accused is dismissed. (See *Forum*.)

(2.) *Crime in another part of the United Kingdom.*—The other parts of the united kingdom are considered at common law as foreign countries in this matter, so that warrants granted in any of them have no effect in Scotland, and *vice versa*. But the common law has been modified by special statutes to the effect of transmitting criminals for trial in that part of the united kingdom in which their crime has been committed, and of compelling the attendance of witnesses in criminal cases.

If any person against whom a warrant is issued by any of the justices of the Court of King’s Bench in England, or of the courts of Great Sessions in Wales, or by any justice of oyer and terminer, or gaol delivery, or any justice of peace, or other person having authority to issue the same, in England, for any crime or offence against the laws of England (b), or by any judge of the King’s Bench, or any justice of oyer and terminer, or gaol delivery, or any justice of the peace, or other person having au-

(a) Hume, ii. 76.

(b) 48 Geo. III. c. 58, sect. ii.

thority to issue the same in Ireland, for any crime or offence against the laws of Ireland (*a*), be in any part of Scotland, the sheriff or steward, depute or substitute, or any justice of the peace of the place where such person is, is to indorse such warrant; which warrant, so indorsed, is a sufficient authority to the officer, who brings it, and to all persons to whom it was originally directed, and to all constables or other peace officers of the place where it was indorsed, to execute it in that place, by apprehending the person named in it (*b*); and, where the original warrant was granted in England, to convey him into the county, city, town, or place of England adjacent to Scotland, in which the crime was committed, and before a justice of the peace of such place, to be dealt with according to law; or, if the crime was committed in a county not adjacent to Scotland, to convey him to any county of England adjacent to Scotland, and before a justice of the peace there, who is to proceed as if the person had been apprehended in that county (*c*); and, where the original warrant was granted in Ireland, to convey him by the most direct way to Ireland, and before a justice of the peace of the county in Ireland, living near the place, and in the county where he lands; which justice of the peace is to proceed as if the party had been apprehended in that county (*d*).

If any person against whom a warrant is issued by the Lord Justice-General, Lord Justice-Clerk, or Lords Commissioners of Justiciary, or any sheriff or steward, depute or substitute, or any justice of the peace of Scotland, for any crime or offence against the law of Scotland, be in any place of England, a justice of the peace of that place is to indorse the warrant; and the person must be carried before the sheriff or steward-depute or substitute, or a justice of the peace of the county of Scotland adjacent to England, in which the crime was committed, to be dealt with according to law; or, if the crime was committed in a county of Scotland not adjacent to England, he must be carried before the sheriff or steward-depute or substitute, or a justice of the peace of any county of Scotland, adja-

(*a*) 44 Geo. III. c. 92, sect. 3.

(*b*) 13 Geo. III. c. 31, sect. 1.—44 Geo. III. c. 92, sect. 3.—54 Geo. III. c. 186, sect. 2.—*Note.* By 45 Geo. III. c. 92, sect. 5, 6, a considerable limitation was introduced with regard to the cases and situations in which indorsements might take place, and it was required that the authenticity of the warrant to be indorsed should be proved on oath before being acted upon. But those restrictions, and among them the provision with regard to the proof of the authenticity of the warrant, were repealed both with regard to English and Irish warrants indorsed in Scotland, and *vice versa*, by 54 Geo. III. c. 186. See Hume, ii. 76, Note.

(*c*) 13 Geo. III. c. 31, sect. 1.

(*d*) 44 Geo. III. c. 92, sect. 3.

cent to England, to be disposed of as if he had been apprehended in that county (*a*). In like manner, if any person against whom a warrant is issued by any justice of the peace in Scotland, or other person having authority to issue the same in Scotland, for any offence against the law of Scotland, escape into or be in Ireland, the warrant is to be indorsed by a justice of the peace in Ireland, and executed in the same way, *mutatis mutandis*, as a warrant granted in Ireland, for apprehending an Irish criminal who is in Scotland (*b*).

The expence of apprehending and conveying the person is defrayed by the treasurer of the county of England or Ireland, or by the sheriff or steward-depute or substitute of the county of Scotland in which the crime was committed; the verity of the account of that expence being previously ascertained, on oath, before two justices of the peace of such county, and allowed and signed by them (*c*).

It is proper, before the Scots magistrate takes any procedure upon an English or an Irish warrant, that he observe whether it be not grossly or palpably illegal. It is also proper, before interponing his authority to the transmission of the person named in the warrant, that he bring the person before him for examination, and satisfy himself, by examining him and those applying, that he is truly the person named in the warrant (*d*).

The course which has now been detailed is the regular course of apprehending a person in one part of the united kingdom, for a crime committed in another part. But the question occurs, whether, in the case of a person who has committed a crime in England or Ireland, coming to this country, it be lawful for a judge of this country, in those situations in which the waiting for a regular warrant from England or Ireland, to be backed, might give the criminal an opportunity to escape, himself to grant an original warrant for his apprehension. This has been done. In a late case, however, strong opinions against its legality were expressed from the Bench (*e*).

By special acts of Parliament (which seem to be only a con-

(*a*) 13 Geo. III. c. 31, sect. 2.

(*b*) 44 Geo. III. c. 92, sect. 4.

(*c*) 13 Geo. III. c. 13, sect. 3.—

44 Geo. III. c. 92, sect. 5.—*Note*, 45 Geo. III. c. 92, sect. 5, requiring that the warrant shall have been issued in England or Ireland, upon an indictment found, or information filed, or in Scotland, upon a libel from the Court of Justiciary, or for a capital crime or felony; and sect. 6, requiring that the signature of the granter be sworn to before indorsing, are repealed by 54 Geo. III. c. 186, sect. 1.

(*d*) Observed on the Bench in Knox against Aitken, 18th December 1813, not reported.

(*e*) John Rae Muir against Sharp, &c. 10th July 1811.

firmation of the doctrine admitted by the common law, in Scotland, in those particular cases), persons who have stolen goods in England or Ireland, and escape with them into Scotland, and are found with them in their possession here, may be tried for the offence here (and so of persons stealing goods in Scotland, and being found with them in England or Ireland); and persons receiving such goods, knowing them to be stolen, may be tried in the place where they received them (*a*). All such persons, of course, may be arrested by an original warrant granted by a Scots judge of the place.

See *Bail*, sect. Criminal of other parts of united kingdom.

In connexion with this matter of offences in another part of the united kingdom, it may be mentioned here, that provision is made for the appearance of persons to answer as parties where warrants are not usually granted, and to give evidence, in criminal processes, in any part of the united kingdom. The service of any *subpœna*, or other process, upon any person in any one of the parts of the united kingdom, requiring his appearance to answer as a party, or to give evidence, in any criminal prosecution, in any other part of it, is as effectual as if served in that part where he is required to attend. If he make default, the court before which he was cited, upon satisfactory proof of the service of the process, transmits a certificate of the default, under seal of court, or under the hand of one of the judges or justices of the same, to the Court of King's Bench in England, if the service was in England; to the Court of Justiciary in Scotland, if it was in Scotland; or to the Court of King's Bench in Ireland, if it was in Ireland; which courts punish the person as for default before themselves (*b*). But witnesses are not punished unless a reasonable sum for expences was tendered to them (*c*). The judges of the courts of record at Westminster, or of the court of sessions of Chester, or

(*a*) 13 Geo. III. c. 31, sect. 4, 5. - 44 Geo. III. c. 92, sect. 7. 8.

(*b*) 45 Geo. III. c. 92, sect. 3. Bell and others, resident in Scotland, having been indicted at the Cumberland quarter sessions, for burdening a parish there with a bastard, by carrying the mother to be delivered there, and not having appeared, one of the justices granted warrant to apprehend them, which was indorsed by a Dumfriesshire justice. Bell, &c. suspended. The Court passed the bill, and prohibited execution till the reasons of suspension should be discussed, after letters expedite, because no *subpœna*, or other process, had been served against Bell, &c. under 45 Geo. III. c. 92, sect. 3, disobedience to which would have authorized warrant in England for arrest to be indorsed in Scotland; as, without service or regular intimation a residenter in Scotland is not bound to appear in England. Suspension, Bell and others against Graham, 20th July 1813. Justiciary records. Nothing farther appears to have been done in this case.

(*c*) 45 Geo. III. c. 92, sect. 4.

of any court of Great sessions in Wales, or of any court of record in Dublin, as the case may be, are directed to indorse any warrant, of the nature of a second diligence, (for apprehending witnesses who have failed to appear upon summons) granted in Scotland for compelling their attendance in Scotland at a criminal trial; and such indorsed warrant has the same force as in Scotland, and authorizes the bearer to apprehend the witness, and to carry him to Scotland, without tender of expences (*a*).

(3.) *Crime in some foreign country.*—It appears that a Scotsman (*b*), or even a foreigner (*c*), who has been guilty of a crime abroad (not in England or Ireland), cannot be seized here, and carried away, against his will, towards his trial in the country where he offended.

4. *Arrest on suspicion of a crime having been committed.*

The cases which have now been considered are those in which the magistrate arresting *knows* that a crime has been committed, and has reasonable suspicion that the person arrested is guilty. But the magistrate is entitled, in some cases, to arrest a person for examination, upon such circumstances as lead him to *suspect* merely that a crime has been committed, and that the person arrested is guilty. For example, it is lawful to arrest, and commit for examination, a person of a mean appearance, offering for sale a diamond ring, or other valuable article, which a person of his appearance cannot reasonably be supposed to have acquired honestly, so that he may be detained till the truth of his story shall be investigated (*d*); or a person carrying clothes or other articles, in circumstances warranting a suspicion that they have been stolen. If the person instruct that the suspicion is unfounded, he will, of course, be immediately liberated. If he do not, he may be detained for a few days for farther enquiry, and to endeavour to discover whether the articles were stolen, and from whom; and such enquiry ought to be made with all reasonable dispatch. If a discovery cannot be made, the person will be liberated. He cannot be *committed for trial*, as there cannot be a sufficient charge and specification of an offence for that purpose.

The duties of constables and of private persons in arresting criminals, under a warrant, have been explained in the author's summary of the duties of a constable. And, in particular, it

(*a*) 54 Geo. III. c. 136, sect. 3.    (*b*) Hume, ii. 52.    (*c*) Ibid. 55.  
 (*d*) Henderson against Scott, 7th February 1793.



is there noticed that, when a person suspected of a crime is apprehended, his person ought, in general, to be immediately searched, and all suspicious articles found upon him ought to be marked at the time, by those present at the search, so that they may, if necessary, be able to identify them afterwards as the articles found.

## II. DECLARATION.

When a person, suspected of a crime, has been arrested, as has now been explained, he ought to be forthwith carried before a magistrate to be examined with regard to his guilt. Before proceeding to the examination, the magistrate will order the prisoner to be withdrawn, and his person to be searched, where that seems proper, and has been omitted to be done upon his arrest, as mentioned at the conclusion of the preceding division of this article.

“ In conducting the examination of the prisoner, it is the duty of the magistrate to take care that the man is in the due situation of mind for so serious a task ; neither affected with liquor, nor disordered in intellect, nor under the influence of threats or of promises employed with him to induce him to confess. For, as we shall afterwards see, his confession on this occasion will be so far only a circumstance of evidence against him on his trial, as it is emitted soberly, and of his own free will ; and nothing can follow in the way of punishment or severity against him as for a contempt, though he decline to make an answer at all. On all those matters, it is the business also of the magistrate duly to inform the prisoner, who may not always know, or may sometimes be afraid, to assert his privilege. Moreover he ought to be warned that his declaration may, and probably will be made use of against him, on his trial. To be of any material service to the prosecutor on that occasion, the prisoner’s declaration must be taken down at large in writing ; and it must be read over to the prisoner ; and be signed by him and the magistrate ; or, if he cannot, or will not sign, by the magistrate instead of him ; the whole in presence of creditable witnesses, who have heard and seen the examination from first to last (not the subscription only of the magistrate and the prisoner), and who, in testimony thereof, put their names to the writing, that, if necessary on the trial, they may be able to authenticate it, and swear to all that passed on the occasion” (a). In the declaration, mention ought to

(a) Hume, ii. 78, 319.

be made of the age of the delinquent, of his designation, name, and residence, and of the place, parish, and shire, in which the crime is said to have been committed. The declaration ought to be written on a sheet or sheets of paper distinct from the rest of the precognition: and where there are several persons accused, their declarations ought, in like manner, to be written separately from each other. The declaration ought to be signed on each page. If the declarant cannot or will not write, the declaration ought to bear so. In the end of the declaration, mention ought to be made of at least two credible witnesses, exclusive of the magistrate and the writer, present at emitting it, each of whom ought to sign as witness (*a*); but it does not require a testing clause with the writer's name, &c. as a private writ does (*b*). The taking of the declaration cannot be delegated to the clerk or other person (*c*).

Great care ought to be taken by the magistrate in expressing the declaration, so as to convey correctly the meaning of the accused, without any exaggeration; and nothing which he may state favourable to his case ought to be omitted any more than statements of an opposite description (*d*).

When a delinquent is disposed to confess, apparently in expectation of being admitted as king's evidence, it must be kept in view that the magistrate has no authority to give assurances which may fetter the crown counsel, in afterwards determining whether it is proper to bring such person to trial (*e*).

It is often found necessary, and is usually proper, in the course of the precognition, to take other declarations from the accused. This is not incompetent even after commitment for trial, if the libel have not been served; but, in ordinary circumstances, the examination of the accused is concluded before commitment for trial. The previous declaration or declarations, if more than one, ought, in the first place, to be read over; and the additional declaration ought to set out with stating this to have been done, specifying the dates of the declarations so read over. The whole of them, of course, ought to be preserved. It is desirable to have the same witnesses to all the declarations of

(*a*) Rules, 1765, *supra*.—Rules to be observed in regard to precognitions, and making presentments for trial, of crimes before the High Court and the Circuit Courts of Justiciary, approved of by the king's counsel for Scotland, on 21st Feb. 1824; copies of which were sent to the procurator-fiscal.

(*b*) Rules 1824, *supra*.

(*d*) Rules, 1824, *supra*.

(*c*) Rules 1824, *supra*.

(*e*) Rules 1824, *supra*.

one delinquent, or of the several delinquents accused of the same offence, when this can conveniently be done (*a*).

It is not necessary that a declaration should recite the warrant by which the delinquent has been brought before the magistrate (*b*).

The course proper to be followed where it is necessary to take a declaration, as a party, from a person who has previously been examined as a witness, is noticed in the next division of this subject, which regards "Precognition."

Articles shewn to the prisoner in the course of his declaration, *e. g.* stolen goods, forged documents, instruments of murder or housebreaking, ought to be identified, either by references to the declaration written upon them, if that can conveniently be done, and signed by the prisoner and the magistrate, and by the witnesses to the declaration (in order that they may be able to prove that the articles are those referred to in the declaration); or by a label having such reference and signatures affixed at the time, with the seals of the magistrate and the witnesses.

### III. PRECOGNITION.

If the justice of the peace, or other magistrate, do not see cause, on the examination, instantly to liberate the accused, he must, in cases requiring to be laid before the crown counsel, take without delay a *precognition*, as it is called, concerning the grounds of suspicion of his guilt, by taking, in writing, the declarations of such persons as have cause of knowledge respecting the charge. If the witnesses be not attending at the time, so as to be examined without delay, it is lawful for the magistrate to commit the prisoner to gaol, there to remain for farther examination, or until a precognition shall be taken. And against a warrant of this form he is not entitled to his relief by bail as a matter of right, though, in cases of petty crime, he is often indulged with it. In this, as in all other things, the magistrate must use good faith and fair dealing with the prisoner. For, if he unreasonably delay to take the precognition, or make use of false and affected pretences of farther inquiries, in order to lengthen the man's confinement, he shall be answerable for this malversation (*c*). The commitments for examination, or for farther examination, may be renewed according to occasion till the magistrate sees proper to commit for trial; but it is essential that no unnecessary delay occur.

(*a*) Hume, ii. 318-50.—Rules 1824, *supra*.

(*b*) Rules 1824, *supra*.

(*c*) Hume, ii. 78, 79.

It is noticed under *Wrongous Imprisonment*, that close imprisonment, that is solitary and inaccessible imprisonment, where access is denied to friends and agents, beyond eight days from the time of commitment, is prohibited. It is evidently proper that witnesses, of whom there is reason to apprehend that they may be biassed or corrupted by the accused, be precognosed while he is under close imprisonment.

It will readily occur that, though the ordinary case is here supposed of the accused being in custody, and being examined before the precognition is commenced, yet several particulars necessary to be investigated, in the way of precognition, may often fall to be inquired into and ascertained before the accused is in custody, or even before suspicion has attached upon any particular person as the perpetrator of the crime; for example, the appearances at the place where a murder has been committed and the like.

In many cases, particularly those of murder, fire-raising, &c. much advantage may be derived from the magistrate, or other person of superior intelligence, repairing instantly to the spot where the crime is committed, so as to ascertain, with precision, all appearances that are there exhibited, such as marks of feet, blood, &c. (*a*), and providing proper witnesses to observe and prove those appearances if necessary (*b*).

The course for compelling the witnesses to appear is by warrant of citation subscribed by the judge, which he may equally give of his own motion, or on the application of the private or public accuser. This order, in case of their refusal, or contumacious failure to attend, may be followed with second diligence, as it is called, or warrant to apprehend the persons in default, and bring them before the judge to be examined. After their appearance also, if they refuse to answer, they may in like manner be coerced with imprisonment till they comply. Where, from popular favour towards the prisoner or the offence, or other cause, the truth cannot otherwise be obtained, the witnesses may be put upon oath; which, if they shall refuse, they are for this contempt also liable to be imprisoned (*c*). But it appears that witnesses ought to be precognosed upon oath with great caution, and that it ought to be done as seldom as possible. To prevent concert, their declarations are taken separately, out of each other's presence; and otherwise they cannot, in the ordinary case at least, appear as witnesses on the trial.—(See *Proof*, sect. Criminal, how witnesses examined.—

(*a*) Rules 1765, *supra*.  
(*c*) Hume, ii. 79.

(*b*) Rules 1824, *supra*.

*Perjury, &c.*)—Neither the accused, nor any one for him, need be (nor ought to be) admitted to these proceedings; nor can he demand as of right a copy, or even a perusal of the declarations; and though the magistrate may, and certainly will attend to his suggestions in calling witnesses, as little is there any allowance, at this period, of the citation of witnesses by process at the prisoner's instance, or on his behalf. All precognitions must be taken before the raising, or at least before execution of the libel (*a*).

The declarations of witnesses in a precognition can never be used in any shape against those witnesses; and, indeed, they may call for them if they please, and see them cancelled before they give their evidence in the trial.

It may happen that one who is cited as a witness appears, on enquiry, to have been himself concerned, in a different capacity, in that which he relates, so as to make it proper that he should be examined as a party accused. The proper course in such a case is to cancel his declaration as a witness, and examine him of new as a party, after putting him on his guard as to the different and more serious situation in which he is now placed (*b*). It appears that the declaration ought to be cancelled (that is destroyed or rendered altogether illegible) in his presence, in order that he may feel himself at full liberty when about to undergo his examination; and that it ought not to be preserved and referred to in the declaration as a party, even though he should consent, as the declaration as a witness is taken for a purpose altogether different, and under an obligation to answer the questions put.

In cases where a person has received such violence as to induce the belief that his life is in any degree of danger, the declaration of such person should be taken upon oath, in presence of credible witnesses, who should subscribe the same along with the judge who takes the declaration, and with the party declaring, if he is able. And in the event of any unexpected turn in such person's case, the medical persons who are usually employed ought to be instructed, (if there is no time to call in a magistrate), to take down the statement of the dying person before witnesses. A similar course should be followed with regard to every person who is to be a witness upon a trial, and who happens to be taken dangerously ill (*c*). If the person examined be aware of his danger, it is proper that this should appear in his declaration, as it gives it greater weight; but if he be not aware of his danger, and if it be considered by the

(*a*) Hume, ii. 79–80.

(*b*) Ibid. 80.

(*c*) Rules 1824, *supra*.

medical attendants to be inexpedient to inform him of it, the declaration ought nevertheless to be taken, as it will still be received, and may be an important ingredient in the evidence.

When there is any reason to suppose that death has proceeded from violence, or not from a natural cause, the body ought to be immediately examined, and opened, if necessary, by persons of medical skill, (under a warrant granted for that purpose) and an investigation made into all circumstances connected with the case. The persons of medical skill ought without delay to furnish a report, setting forth the circumstances they observe, and their opinion thereupon; and, in the event of any difference of opinion, they ought each to furnish a separate report. In those cases where death is not immediate, care should be taken to obtain accurate evidence in regard to the treatment of the person injured from the time of his receiving the injury, until death shall have taken place (*a*).

When the dead body of a new born child is found, the usual experiment of dropping the lungs into water ought to be tried, to know if it has breathed (though the floating of the lungs is less conclusive of the child having breathed than was at one time supposed.—See Hume, i. 288; and Burnett, Appendix, 24). The condition of the body of the child must also be inspected, to see whether it be to the full time; and whether any, and what marks of violence appear on the body (*b*).

The body of a woman suspected of having brought forth a child must be examined by skilful persons, by a warrant for that purpose (*c*).

When a person is suspected to have wounded or killed another, his person, house, and repositories, ought to be carefully searched for bloody clothes, and for sword, or other weapon, by which the wound may have been given; and the condition of the things so found ought to be as specially and particularly described, as the nature of them will admit, by the declarations of the witnesses present; and to be ascertained, where that can be done, by labels affixed and sealed to them, with a writing on them, relative to the declarations of the delinquent or witnesses, subscribed by them and the judge. In some articles, *e. g.* stolen books, forged papers, &c. the references to the declarations may conveniently be written on the article. The same rule ought to be observed as to other crimes; and the pieces of writing, instruments of committing the delict, stolen goods, &c. so found, to be marked as above directed (*d*).

(*a*) Rules, 1824, *supra*.

(*c*) Hume, ii. App. 9.

(*b*) Rules 1765, *supra*.

(*d*) *Ibid.*

The criminal act ought to be as distinctly specified as possible. 1. The manner of it should be described as particularly as can be done. For example, in the case of robbery, the detail of the mode of committing the crime ought to be given, the things taken from the person assaulted ought to be described, and the mode in which they were taken, whether by actual violence or by presenting a pistol, or the like; and, in short, all that passed on the occasion (*a*). And in more complex crimes, as bribery, a very circumstantiate account of the facts is necessary (*b*). In some cases, however, as fire-raising, certain cases of murder, &c. it is sometimes not possible to learn much of the detail of the offence (*c*). When there is a wound, the part of the body, and other particulars of the wound, ought to be described. 2. The time and place of the offence ought to be described as distinctly as possible. The place is extremely material. It ought to be distinctly described by its parish and county. When committed in a town, consisting of two or more streets, the name of the street should be specified; and in those offences which are frequently perpetrated at a distance from any habitation, such as murder, assault, or robbery, the *locus delicti* should be ascertained, not only by parish and county, but by its proximity to some known place, which must be accurately described (*d*); as at such a bridge, or about half a mile from such a church, upon the road leading from that church to such a place, or the like. If the parish be doubtful, the parishes amongst which the doubt lies, and any circumstances which render one of them more probable than the rest, ought to be mentioned. In some cases, as forgery, incendiary letters, &c. it is impossible to attain very great precision as to the place (*e*). The time of the offence, too, and of the circumstances connected with it, ought to be as distinctly ascertained, by a competent number of witnesses, as can be accomplished (*f*). And pains should be taken also to endeavour to fix the time in the recollection of the witnesses, so that they may speak accurately on this point at the trial; and they may be directed to mark down the time, so that it may not escape them in the interval between the precognition and the trial (*g*).

Care ought to be taken to give the name of the accused, and of every witness (according to the orthography used by them), and also to design them by their place of abode, parish,

(*a*) See Hume, ii. 184-5.

(*d*) Rules 1824, *supra*.

(*f*) See *ibid.* 213-218.

(*b*) *Ibid.* 185.

(*e*) Hume, *ibid.* 199-213.

(*g*) Rules 1824, *supra*.

(*c*) See *ibid.* 186.

and shire ; and not to design any person in general, in *such a place*, but his particular occupation ought to be expressed ; and, if he cannot be designed in that way, at least he ought to be designed as son to such a one (*a*). It is a flaw in the indictment if it be materially wrong in either the name or designation of the accused ; or if it give a general or equivocal description of him. When a person has assumed various names, as many of those as can be learned ought to be furnished (*b*). If nearly the same accuracy be not observed in the name and designation of a witness, he may be objected to upon the trial, and will be set aside, which may often defeat the ends of justice (*c*).

The age of the witness ought to be taken down.

When the precognition is taken in one county, and any of the witnesses reside in another, this ought to be distinctly mentioned (*d*).

When, between the time of sending up the precognition to the agent for the Crown at Edinburgh, or the time of serving the indictment, and the time of the circuit, any of the witnesses change their place of residence, notice of this ought to be immediately transmitted to the agent for the Crown (*e*).

Care ought to be taken to give the statement of the witnesses as correctly as possible in their own words, especially as to every point of any importance, and on no account to make the evidence appear stronger than can be fully supported in the event of a trial. The nature of the defence to which the accused may probably have recourse ought also to be kept in view, and evidence calculated to meet that defence, as far as possible, supplied (*f*).

It is desirable that the dress which a delinquent wears when apprehended should, if possible, be preserved, so as he may wear it at his trial. Owing to the change of dress, a difficulty is often experienced in the identification of persons accused ; and in those cases where there is a risk of a question as to the *identity* of the accused being raised, he ought not to be allowed to make any decided alteration in his appearance, such as shaving his head, dying his hair, and allowing whiskers to grow to a large size, or removing them altogether, &c. ; and if any such alteration should take place, it ought to be immediately communicated to the procurator-fiscal, and by him in-

(*a*) Rules 1765, *supra*.—Rules 1824, *supra*.

(*b*) Hume, ii. 156.

(*c*) Ibid. 367.

(*d*) Rules 1765, *supra*.

(*e*) Hume, ii. App. 9.

(*f*) Rules 1824, *supra*.



minated to the Crown agent, if the case is to be tried in the Court of Justiciary (*a*).

All articles produced should have labels affixed to them, with a writing thereon, signed by the witness or witnesses, by whom such articles or labels are to be identified. Such labels should be fixed to the articles as soon as possible, so as it may not be necessary to trace them through different hands, and in such a manner that they cannot be removed without breaking the seal, the identity of which it may be necessary to prove (*b*).

Where matter of *serious* difficulty or doubt occurs in the course of taking a precognition, communication may be made, but without delay, as to the difficulty, and the precognition, so far as taken, may be transmitted to the Crown agent, for the advice of the King's counsel; but, in general, precognitions should at once be completed, and should not be transmitted in portions, or in an unfinished state (*c*).

This is the course advised for sheriffs; but when such a thing threatens to occur before a justice of peace, it seems, usually, the proper course to allow the whole matter to go to the sheriff, that he may finish the precognition.

If the precognition produce such evidence against the accused as may reasonably be expected to obtain a conviction upon a trial, he is committed for trial. (See *Commitment for Trial*).

So soon as the precognition is completed, it ought to be sent to the crown agent; and it must, in every instance, be accompanied by a schedule, which must be correctly filled up, so as to shew that no undue delay has taken place in the course of the proceedings, and that the accused has not suffered any unnecessary severity in regard to his imprisonment (*d*). A form of the schedule is annexed to the rules by the crown counsel in 1824 for precognitions, which are sent to the procurator-fiscals. It consists of the following columns:—Name of the accused—Date when first committed to prison—Place where accused committed, and by what magistrate—Crime—Date of warrants of commitment for farther examination—Dates of declarations of accused—Date of warrant of commitment until liberated in due course of law—Whether prisoner in jail or liberated on bail—Date of the last step taken in the precognition—Date of forwarding precognition to the crown agent.

Along with the precognition should be transmitted not only

(*a*) Rules 1824, *supra*.

(*b*) Rules 1824, *supra*.

(*c*) Rules 1765, *supra*.—Rules 1824, *supra*.

(*d*) Rules 1824, *supra*.

It was provided by an act of Parliament that informations for trying crimes at the circuits should be by presentments to be made by the justices, or by sheriffs, &c. at certain prescribed times (*b*). But the conducting of precognitions has usually been allowed to fall into the hands of the sheriff, who generally has the offender in custody, or under bail, and the whole precognition finished and transmitted to the King's counsel, before the time appointed by statute for making regular presentment (*c*). And it is understood that, when a justice does finish a precognition, he immediately transmits it to the agent for the crown, without getting regular presentment made at all.

All letters or communications, in relation to delinquents, ought to be sent directed to the agent for the crown at Edinburgh (e).

#### IV. FORMS OF PROCEEDINGS.

### **1. *Petition by Procurator-Fiscal.***

**“ The petition of A B, procurator-fiscal of court, for the  
“ public interest,**

**“ Humbly sheweth,**

"That C D" [design him] "did at upon  
"the day of or one or other of the days

(a) Rules 1824, *supra*.

(b) 8 Anne, c. 16. sect. 4. For the form of an information and presentment with the deliverance upon it, see Hume, ii. 521-2.

(c) Hume, ii. 26.

(d) Rules 1765, *supra*.

(e) Ibid.

“ of that month, or of                      preceding, or  
 “ following” [state the offence].

“ May it therefore please your Honours to grant warrant to  
 “ search for and apprehend the said C D, and to bring him  
 “ before you for examination ; and thereafter to grant war-  
 “ rant to commit him to jail, there to be detained till  
 “ brought to trial for the said crime, or till liberated in due  
 “ course of law.”

A B, P. F.

## 2. *Warrant to Arrest for Examination.*

[Place and date]—“ I, G H, Esq. of                      one of  
 “ his Majesty’s justices of the peace for the county of R, hav-  
 “ ing considered the foregoing petition, grant warrant to con-  
 “ stables to search for and apprehend the said C D, and to bring  
 “ him before any one of the said justices for examination.”

“ G H, J. P.

[When the arrest takes place without a previous written ap-  
 plication, it may be in the following terms :—]

[Place and date]—“ I, G H, Esq. of                      one of his  
 “ Majesty’s justices of the peace for the county of R, being  
 “ credibly informed that C D” [design him] “ did at  
 “ on                      or one or other of the days of that month, or  
 “ of                      preceding, or                      following,” [state the  
 offence] “ do therefore grant warrant” [as above].

## 3. *Indorsing Warrant.*

[Place and date.]—“ I, one of the justices of the county  
 “ of                      grant concurrence to the execution of the pre-  
 “ ceding warrant within the said county.”

“ J K, J. P.”

## 4. *Prisoner’s Declaration.*

“ At                      the                      day of                      ,                      years,  
 “ in presence of G H, Esq. of                      one of his Majesty’s  
 “ justices of the peace for the shire of  
 “ Compeared C D” [design him] “ aged                      years, who  
 “ being examined by the justice, declares, That” [insert his



6. *Warrant to Cite Witnesses.*

[Place and date].—"The justice, having considered the foregoing representation, grants warrant to constables for citing witnesses as craved.

"G. H. J. P."

7. *Copy of Citation to Witnesses.*

"I, L. M, constable, charge you N O," [design him] to appear before his Majesty's justices of the peace for the county of , at upon the day of , to be examined in a precognition at the instance of the procurator fiscal.

"L. M, Constable."

8. *Precognition of Witnesses.*

"Edinburgh, 182 Compeared N O," [design him] "aged years, who being examined, Declares," [take down the substance of his statement.] "All which he declares to be truth.

"N O.

"G H, J. P."

"Compeared P Q," [design him] "aged," &c. [as above.]

9. *Commitment for Examination, or further Examination.*

[Place and date].—"The justice having considered the foregoing petition and the declaration of C D," [where the arrest took place without a previous written application, and on the justice's own motion, as in No. 2 of these forms, the words "foregoing petition and" to be omitted] "grant warrant to constables to commit him to the tolbooth of , the keepers whereof are hereby ordered to detain him for (farther) examination.

"G. H, J. P."

See *Commitment for Trial. Bail. Liberation.*

## ARRESTMENT AND FURTHCOMING.

This is a diligence by which the law conveys a moveable claim from the person in right of it to his creditor. It consists of two parts, *Arrestment* and *Furthcoming*.

## 1. ARRESTMENT.

Arrestment is the command of a judge, by which he who is debtor in a moveable obligation to the arrester's debtor, whether to pay a debt, or to deliver a subject belonging to the arrester's debtor, is forbidden to make payment of his debt, or to perform his obligation, till the debt due to the arrester be paid or secured (*a*). The arrester's debtor is usually called the common debtor: He in whose hands the diligence is used, the arrestee (*b*). The warrants from inferior courts for arresting are commonly called precepts. These precepts cannot be executed against the arrestee beyond the inferior judge's territory (*c*).

Arrestment may be obtained on the creditor instituting an action before the judge for his debt, which is called an arrestment on the dependence (*d*), and may be obtained summarily upon production of the libelled summons (*e*). It appears that justices may thus authorise arrestment on the dependence of actions brought before them, not under the small debt act; (See *Justices*, sect. Particulars not in commission); but it seems very questionable how far arrestment on the dependence can proceed upon actions brought under the small debt act, as that act only specially authorises arrestment on decree; and, although such arrestments are used in some counties, it is understood not to be the general practice, and, in particular, it is not the practice in the county of Edinburgh. Arrestment is also obtained from justices upon decrees pronounced by them either under the small debt act or otherwise. Registration of written obligations by consent, in order to found constructive decree, is allowed in certain courts, but seems not competent before justices, as they have no proper civil jurisdiction.

1. *On what grounds.*

Arrestment may be used on any debt in which the debtor is personally bound. It cannot, in the common case, proceed on a debt of which the term of payment is not yet come; but it may, if the debtor be declining in his circumstances, and

(*a*) Ersk. iii. 6. 2.(*b*) Ibid.(*c*) Ibid. 3.(*d*) Ibid.(*e*) 54 Geo. III. c. 137, sect. 2.

squandering his funds, or if other creditors be carrying them off by diligence (*a*).

It cannot proceed where the object of the action is to obtain specific performance of a fact (*b*).

### 2. *In whose hands.*

The precept of arrestment is commonly in general terms to arrest all sums due to the common debtor; and the arrestment is laid, in the like general terms, in the hands of any person whom the party pleases; so that it becomes a question for the judge afterwards what shall be its effect.

The arrestment must be used in the hands of a person who is accountable directly to the common debtor. For instance, A being indebted to B, B being indebted to C, and C wishing to attach the debt due by A to B, he cannot attach money of A in the hands of A's factor, by arrestment in the factor's hands, because that person is debtor to A, not to B (*c*). The only exception is in the case of a corporate body. Arrestment may be used in the hands of their treasurer or directors, or other proper officers, for a debt due by the corporate body to the common debtor (*d*).

Arrestment cannot be used effectually in the hands of the common debtor himself, nor in the hands of any person having the naked custody, who is truly possessing for the debtor. Thus, furniture cannot be arrested in the hands of the common debtor's servant, nor the chest of the common debtor, he being a servant, in the hands of his master. Pointhing is the proper diligence.

### 3. *Against what.*

All moveable goods belonging to the common debtor, in the possession of third parties, may be arrested; and all moveable debts due to him, whether pure or conditional, and the arrears of rent, or interest from heritable subjects, and every claim competent upon moveables (*e*); and, now, debts by bonds bearing interest, or having clauses of infestment, if no infestment have been taken on them (*f*).

It is not necessary that the arrestee be immediate debtor to the common debtor in a liquid sum. It is sufficient that the arrestee have become accountable. For example, if the common debtor be partner of a company, even though their funds

(*a*) Ersk. iii. 6. 10.

(*b*) Ibid.

(*c*) Muirhead and M<sup>c</sup>Michael against Miller, Dict. i. 57.

(*d*) Keir against Menzies, 10th January 1739. Kilk. Arrestment, 3—Mossman against Carmichael, 22d June 1742. Dict. iii. 43.—Dalrymple against Bertram, 23d June 1762. Kamcs.

(*e*) Erskine, iii. 6. 6.

(*f*) 1661, c. 51.

be vested in heritable property, his creditor may arrest his share in the company's hands.

The debt against which arrestment is used must be an existing debt. It is not necessary, however, that it be immediately exigible. For instance, arrestment may be used to-day against a bond not due for six months, though execution by furthcoming must of course be delayed (*a*). In like manner, arrestment in the hands of an employer affects the whole sum due to the tradesman for work in progress, though payable by instalments.

In debts which carry a yearly profit, the rent, interest, or profit of the past terms and of the current *term* only, can be arrested, (not the current *year* (*b*), unless the payment be annual). The rest is accounted future debt (*c*). For instance, arrestment used before Whitsunday in the hands of a tenant, by the landlord's creditor, attaches the rent payable at Whitsunday; but it attaches the rent legally due for the half-year's possession till Whitsunday, though, by the agreement of parties, not payable till a subsequent period (*d*). Where the principal obligation giving rise to the annual profits is arrestable and arrested, it and all future profits are carried (*e*).

Sums destined by the granter for a special purpose cannot, by any diligence, be inverted from that purpose (*f*).

Alimentary claims are not arrestable where the claim is purely of that kind, and bestowed for necessary aliment, as in the case of paupers, or persons receiving an allowance from any charitable institution. The alimentary provisions to the widows and children of ministers are not arrestable (*g*). The pay of officers and soldiers is not arrestable. An alimentary claim, in general, given by the donor, specially as such, and not more than necessary, is not arrestable; the surplus is. Salaries seem arrestable, at least *salvo jure competentie* (*h*). Minister's stipends are arrestable (*i*). Servants' wages are arrestable, except probably as far as indispensably necessary to keep them in a condition to perform their service (*j*).

(*a*) Stair, iii. 1. 29.—Brown against Johnston, 21st February 1624.—Durie.—Scott against L. Drumlanrig, 3d July 1628, Durie.

(*b*) Livingstone, &c. against Kinloch, 10th March 1795.

(*c*) Ersk. iii. 6. 9.—Seton against Lady Caithness, 16th June 1761.

(*d*) Handyside against Corbyn and Lee, 15th January 1813.

(*e*) Ersk. iii. 6. 9.

(*f*) Ibid. iii. 6. 7.

(*g*) 19 Geo. III. c. 20, sect. 7. 8.

(*h*) Hale against his Creditors, 12th February 1736, Clerk Hume.—Holiday against M'Kaile, 23d Feb. 1773.—Laidlaw against Wylde, 9th June 1801.

(*i*) Smith against Earl of Moray, 13th Dec. 1815.

(*j*) See Boog against Davidson, 9th July 1688, Stair's Dec.—See Stair, iii. 1. 37.—Ersk. iii. 6. 7.—Bell, 3d Edit. i. 37.



Debts due by bill cannot be arrested in the hands of the acceptor, so as to prevent the common debtor (who was drawer and payee of the bill, or who was holder, at the time, of a bill drawn by a third party) from effectually indorsing them *bona fide* to another for value in the course of trade. But if the common debtor continue in right of the bill till furthcoming be raised, the arrestment is effectual (*a*). Bills cannot be arrested in the hands of a person to whom they have been indorsed by the common debtor for a special purpose (*b*).

No personal right to lands can be affected by arrestment; nor debts which are heritable, as bearing a tract of future time, for instance a bond of annuity, but the arrears and current profit of these may; nor debts which, though originally simply moveable, have become real by the superinduction of an heritable security (*c*).

#### 4. *Loosing.*

Arrestment may, on the common debtor's application, be loosed, upon his finding caution (in the books of the inferior court granting arrestment (*d*),) to pay to the arrester the sum arrested, or the amount of the debt on which arrestment is used, if that be less, on his being legally ordained to do so; wherever there is not either a formal decree, or a decree by registration (which last is not competent before the justices). Even where there is decree, the arrestment may be loosed, on caution, if the term of payment have not come, or the condition have not existed (*e*); if the obligation be an *illiquid* mutual contract, though registered (*f*); or it may be loosed by the Court of Session, if they suspend the decree (*g*).

#### 5. *Breach.*

If the arrestee pay or deliver the sum or subject arrested to the common debtor, he is liable to pay the damages which have arisen from his doing so, with expences (*h*).

#### 6. *Death.*

On the death of the *arrestee*, the arrestment, as far as prohibitory, falls, so that his heir may pay, unless he be also properly interpellated; but it subsists to the effect of supporting an

(*a*) Moir against Paxton, 9th Dec. 1766.

(*b*) Dick against Goodall and Co. 1st June 1815.

(*c*) Watson against Macdonald, 5th Dec. 1794.

(*d*) Stair, iii. 1. 33.—Bankton, iii. 1. 37.

(*e*) Ersk. iii. 6. 12.

(*f*) Ibid. (*g*) Ibid.—White, 22d July 1751, Kilk. Arrestment 9.

(*h*) Grant against Hill, 27th Feb. 1792.

action of furthcoming, while the subject remains in the hands of the heir, or of giving a preference to the arrester over arrestment in the hands of the heir. On the death of the *common debtor*, the arrestment still subsists, and gives to the arrester a preference over another creditor using confirmation as executor creditor. On the death of the *arrester*, it subsists, to all effects, in favour of his heir (*a*).

## II. FURTHCOMING.

To make the arrestment effectual, the arrester must follow it up with an action of furthcoming, calling the arrestee and the common debtor, concluding to have the debt arrested paid to him, or to have the subject arrested sold, and the price delivered to him (*b*).

Furthcoming is competent before the ordinary civil court from which the arrestment proceeded. In an arrestment used on an action brought before justices of the peace, not under the small debt act, some persons have thought that the furthcoming is competent before them, at least where the subject arrested is a sum of money : but this is considered not to be free from doubt. Furthcoming upon an arrestment used under the small debt act, where the subject arrested is a sum of money, is of daily occurrence in the small debt court, which is constituted an ordinary civil court for small debts. Furthcoming is also competent before the Court of Session, or before any inferior ordinary civil court, to whose jurisdiction the arrestee is amenable, although the arrestment did not proceed from it (*c*). And, therefore, it appears that furthcoming of sums of money arrested is competent before justices acting under the small debt act, although the arrestment proceeded from other courts ; but not otherwise than under the small debt act, as justices have no proper civil jurisdiction independently of that act, except in certain special cases. (See *Justices*, sect. Particulars not in commission.) And, therefore, also where the subject arrested consists of moveables, not being a sum of money, the furthcoming ought to be brought before the Judge Ordinary ; and the same course seems to be more safe and proper where the subject arrested is a sum of money, if the arrestment have proceeded before justices not acting under the small debt act.

(*a*) Erskine, iii. 6. 11.

(*b*) Erskine, iii. 6. 15.—Bell's Commentaries, 3d edit. i. p. 341.

(*c*) Stair, iii. 1. 24.—Bankt. iii. 1. 31.—Ersk. iii. 6. 15.—Bell's Commenten. 4th Edit. i. 341.

1. *What the pursuer must establish.*

1. The pursuer must establish the debt due to himself by the common debtor, and ascertain its precise extent, as he can be no farther entitled to the subject arrested. This is held to be admitted, if not controverted by the common debtor. It is for this reason that the common debtor is made a party to the action (*a*). The arrestee may, in this action, object any nullity in the arrestment; but no person, except the common debtor, can plead that the debt of the common debtor to the arrester is paid (*b*). 2. The pursuer must shew that a debt is due by the arrestee to the common debtor. If the debt due by the arrestee to the common debtor was constituted by writing, the pursuer may recover the ground of it, by incident diligence, from the common debtor, or other possessor. Where the debt due by the arrestee to the common debtor was not constituted by writing, the arrester may prove the debt by witnesses, if that would have been competent to the common debtor (*c*), or he may refer it to the oath of the arrestee, which will often be the only mode of proof within his power; but such oath will not affect the common debtor in any action which he may afterwards raise against the arrestee. All defences against the common debtor may be used against the arrester; so that, though the debt was constituted by writing, the arrestee may refer the defence to the common debtor's oath (*d*).

2. *Terms of decree.*

Where the subject arrested is a sum of money, it is by the decree of furthcoming directed to be paid to the arrester, towards satisfying his debt. Where it is a certain *corpus*, or consists in goods, the decree ordains it to be put up to public sale, and the price to be delivered to the arrester. This sentence establishes in the pursuer a full right in the subject arrested, and excludes poiding by other creditors (*e*).

Where the debt on which arrestment is used is a future certain debt, the intervening interest is discounted. Where that debt is contingent, the pursuer can ask nothing more than consignation or caution to pay, if his debt shall become due (*f*).

## III. FORM OF ARRESTMENT.

"In virtue of a decret pronounced by his Majesty's justices  
 "of peace for the shire of \_\_\_\_\_, upon the \_\_\_\_\_ day of  
 "\_\_\_\_\_ containing warrant of arrestment, in an action at  
 "the instance of A B" [design him] "against C D" [design

(a) Ersk. iii. 6. 16.

(b) Ibid.

(c) Sec Bell's Com. 4th edit. l. 34.

(d) Ersk. iii. 6. 16.

(e) Ibid. 17.

(f) Bell, 3d edit. l. 345.

him], "I, L M, constable, fence and arrest in the hands of  
 "you G H" [design him] "all sums due by you to the said  
 "C D, and all goods and effects in your custody pertaining  
 "to the said C D, to remain under sure fence and arrestment  
 "till payment to the said A B of the sums" [mention them]  
 "in said decreet. This I do upon this            day of  
 "before these witnesses, N O and P Q" [design them].  
 "L M, Constable."

[Where the arrestment is upon a depending action, the beginning is varied accordingly, and the conclusion is] "till sufficient caution be found that the same shall be made further coming to the said A B," &c.

[It is easy from the above to draw out the officer's execution of arrestment. See *Process*.]

### ASSIGNATION.

An assignment (questions with regard to which may occur before justices in the exercise of their civil jurisdiction) is a written deed of conveyance, by the proprietor, to another, of any moveable subject or right, either a debt, or a moveable *corpus*. The granter is called the cedent; the person in whose favour the grant is made is called the assignee. It is now held that any creditor may assign his right (*a*), under certain exceptions which can hardly occur before justices of the peace.

#### I. HOW ASSIGNATION COMPLETED.

No conveyance can be effectual to the grantee, unless the deed of conveyance be delivered to him (*b*). In a question with the cedent, however, it is not necessary that the documents of debt have been delivered. Assignations of debts, as bonds, are completed by intimation by the assignee to the debtor; assignations of moveable goods, by an instrument of possession (*c*).

To make the assignation effectual against others than the cedent, there must be intimation to the debtor, or something equivalent. Thus a person who has obtained a second assignation, giving intimation before the first assignee, is preferable; and an assignee cannot plead compensation upon the debt assigned, if the concourse ceased before intimation; and an assignee is excluded if, before intimation, a creditor of the deceased cedent have used confirmation (*d*).

(*a*) Ersk. iii. 5. 2.

(*b*) Ibid. 3.

(*c*) Ibid. 1.

(*d*) Ibid. 3.—Cust against Garbet and Company, 8th March 1775.

The intimation should strictly be a notification in the personal presence of the debtor by some public officer, as a notary. Such intimation may be proved by the writ or oath of the debtor (*a*). Formal notification will be dispensed with if it be proved that the transference was intimated to the debtor otherwise; as, that an action was brought by the assignee, or that he gave a charge on letters of horning, or that the conveyance was produced by him in a process to which the debtor was a party; or that citation was given by him on a diligence; or that the debtor had, by a missive or other proper writing, on seeing the conveyance, promised to pay; or that the assignee had had possession, as by payment of the interest or part of the principal (*b*). Indeed, the most formal intimation is disregarded where possession has not followed, *e. g.* where the assignee has allowed the cedent to draw the fruits; for all rights of moveable subjects which are granted *retenta possessione* (where the granter continues to hold the possession) are presumed to be collusive for the granter's own behoof, and only intended as a cover against just creditors (*c*). The debtor's private knowledge is not sufficient, even in a question with the cedent (*d*). Intimation is not required if it would be superfluous; as, if the assignation be to the debtor himself, or if it be granted with his consent and he sign as consenter, or if it make part of a deed to which the debtor is a party (*e*). Some kinds of assignation require no intimation; as indorsations of bills of exchange; transmissions of bank notes, or bank bills; which pass like cash (*f*).

Where there are many obligants, whether joint debtors, or principals and cautioners, intimation to one completes the conveyance; but as such intimation to one does not interpellate the others from paying, it is prudent to intimate to all of them. In debts due by a corporation or trading company, intimation to the managers or principal office-bearers is sufficient (*g*).

## II. ASSIGNEE'S RIGHT.

Assignations carry to the assignee the whole rights in the cedent, which corroborate the right conveyed, and all diligences, though not specified (*h*).

As all exceptions competent to a debtor may be proved by the oath of the creditor, a debt assigned may be extinguished by the oath of the cedent, before intimation; because till in-

(*a*) Newton and Company against Callogan, 23d November 1785.

(*b*) Ersk. iii. 5. 4.

(*c*) Ibid. 5.

(*d*) Dicksons against Trotter, 18th January 1776.

(*e*) Turnbull against Stewart, 12th June 1751. Kames, 2, coll. No. 124.

(*f*) Ersk. iii. 5, 6.

(*g*) Ibid. 5.

(*h*) Ibid. 8.

intimation the cedent continues creditor. But no exception of compensation, or even payment, when it is to be proved by the oath of the cedent, can affect the assignee after intimation (*a*). The cedent's oath, however, is effectual against the assignee after intimation, if the subject be rendered *litigious* before intimation, as by an action of reduction brought by the debtor against the cedent (*b*), or if the assignee act in the cedent's name. The debtor may refer to the assignee's oath whether the assignation was gratuitous (granted without a valuable consideration) or in trust for the cedent; and if the assignee admit either of those, the cedent's oath will prove against him (*c*).

All defences competent against the original creditor, which can be proved otherwise than by his oath, are equally competent against an onerous assignee (*d*); and this holds (except in the case of purchasers of moveables, and of onerous indorsees of bills) though the defence should be founded on the cedent's fraud (*e*). The same holds of defences against intermediate assignees.

### BAIL.

A CRIMINAL committed for trial, or about to be so committed, is in certain cases entitled to be liberated on bail. This was part of our old law, but was new modelled and put upon its present footing by the Liberation Act, 1701, c. 6.

#### I. WHEN ADMISSIBLE.

##### 1. *In what crimes.*

The prisoner can insist to be liberated on bail in those crimes only of which the punishment *cannot* reach his life. If the crime *may* be capital, though not usually prosecuted to that extent, the judge ought to refuse bail. Nor can the prisoner insist that the prosecutor shall declare whether he means to prosecute capitally (*f*). Under each crime in this summary it is mentioned whether it be capital. The supreme criminal court, in certain extraordinary circumstances, take bail in capital cases (*g*); but according to practice the supreme court alone (*h*). Where the quality of the crime is uncertain, from the uncertain issue of the deed done, for instance, a dangerous wound, the prisoner is not entitled to bail till the chance of the crime being capital be at an end (*i*). To authorize refusal of bail, the crime must be such for which instant sen-

(*a*) Ersk. iii. 5. 9.

(*b*) Ibid. 10.

(*c*) Ibid.

(*d*) Ibid.

(*e*) Ibid.

(*f*) Hume, ii. 86-7.

(*g*) Ibid. 88.

(*h*) Burnett 334.

(*i*) Hume, ii. 88.

tence of death may be given : and it is not sufficient that conviction in the trial may in a certain farther event be the ground of inflicting death, as in the case of a celebrator of clandestine marriage, who may be banished the kingdom, under the pain of death, in case he return (*a*).

There is an exception introduced by special statutes to the doctrine of refusing bail, if the charge may *possibly* be capital. If any person passing with prohibited or uncustomed goods, and armed with offensive weapons, hinder any officer of the customs or excise, who, in execution of his duty, offers to search for or seize any prohibited or uncustomed goods, from any person passing with such goods, and armed as aforesaid, by beating the officers, or other persons acting in their assistance, it is declared to be lawful for all officers of his Majesty's customs or excise, and all persons by them called to their assistance, who are so resisted, to oppose force to force, and by the same methods that are violently used against them, and by which their lives are endangered, to defend themselves, and execute the duty of their office ; and, if any persons so resisting the officers, or their assistants, be wounded or killed, all justices of the peace before whom such officers and other persons acting in their assistance may be brought, on account of such wounding or killing, are required to admit such persons to bail (*b*). The officer must, however, remain in gaol till a precognition be taken, from which it may appear, whether the fact charged be such as falls under the intendment of this law (*c*). In like manner, if any vessel, liable to seizure or examination under the revenue laws, do not bring to on certain signals by a vessel of the navy or revenue (see *Excise and Customs*, sect. Seizure) ; and if, in consequence of her being fired at, any person is wounded or killed, the officer, or those concerned, on being prosecuted or "brought before any justice " for the same," is to be admitted to bail (*d*). (See *Addendum* at the end of this Treatise).

The crime must in the ordinary case be judged of by the warrant ; but if an offence which, from the narrative of the libel, is merely a petty delict, should be magnified into a capital offence in the charge, and concluded against as such, the supreme criminal court, upon complaint being made to them, would grant relief ; and it would appear that an inferior judge can controul his fiscal in such a case, if he shall convert a mere trespass into a robbery, or magnify a common assault into a hamesucken. Where it is a nice and critical question, or

(*a*) Hume ii. 87. (*b*) 9 Geo. II. c. 35. sect. 35. (*c*) Hume, ii. 90.  
 (*d*) 24 Geo. III. S. 2, c. 47, sect. 23.—47 Geo. III. S. 2, c. 66, sect. 36.

seems only fit for deliberate discussion upon trial, whether the crime be capital or not, the charge must be taken in the meantime as written in the commitment (*a*).

### 2. *In what situations.*

The provisions with regard to bail apply only to full commitment *for trial*; not to commitment for examination. But in cases of petty crime, the accused is often indulged with bail during the precognition (*b*). These provisions do not apply, unless the person be a prisoner *in custody* for trial. The bail may be applied for by "the prisoner, or person ordered to be imprisoned;" that is, it may be applied for equally before as after imprisonment, so as to obtain a discharge of the warrant of commitment if not yet executed (*c*).

Some think that one who has forfeited his bail is not entitled to new bail on being again apprehended for the same crime (*d*). This seems the case where the bail has been forfeited in a court which outlaws for non-appearance (*e*): But when it is forfeited in a court which does not outlaw (which is the case with justices of the peace) it is more doubtful; and perhaps the safer course in the latter case is to admit to bail again.

It has been held that the privilege of bail does not expire at the commencement of the trial, but continues after it, until such time as the accused is remitted to a jury, in courts which proceed with juries: after which it would not be safe to have a rule of admitting to bail; though it may still be done, with the consent of the prosecutor, and under such a penalty as the court think proper; the limitations of the statute not applying to this case (*f*). It is understood that, in practice, bail is allowed, under the limitations of the act, during trial for petty offences before an inferior court without a jury. In such cases, bail to appear at all diets of court seems to subsist till the final issue of the case.

## II. WHAT INCUMBENT ON CRIMINAL.

### 1. *To apply.*

The application for bail ought to be by a written petition, along with which it is proper (though not necessary, by way of form, if the magistrate know about the commitment otherwise) to produce the prisoner's copy of the warrant of commitment (*g*). The magistrate ought to call for it if he wish it. The petition ought to be signed by the prisoner himself, or

(*a*) Hume, ii. 88.

(*d*) Burnett, 351.

(*f*) Hume, ii. 92-3.

(*b*) Ibid. 78.

(*c*) Ibid. 91.

(*e*) Hume, ii. 265.

(*g*) Ibid. 91-2.



by some person by his authority; and ought regularly to be dated, or at least a marking made on it, to ascertain when it was presented (*a*). The application may be made not only to the judge granter of the warrant of commitment, but also to the "Commissioners of Justiciary, or other judge *competent* "for cognition of the crime." So that, for instance, a sheriff may, in this way, if competent to try the crime, release a person committed on warrant of a justice of the peace, or even, in many cases, of a Lord of Justiciary (*b*).

## 2. To find bail.

When the judge, in the manner to be immediately mentioned, finds the crime bailable, the applicant must find bail accordingly. The bail found is that the applicant shall appear and answer to any libel for the offence charged, which shall be raised against him within six months. These are computed from the date of the bond (*c*). The six months allowed are usually sufficient to enable the prosecutor to prepare the case for trial; and it does not appear that the Court of Justiciary, in any instance, have ever put the prisoner to a renewal of his bail for a farther term, on expiration of the first (*d*). And it is not done in the inferior courts. And it seems to be very questionable whether there is any authority in the act 1701, or any reason in principle for apprehending and committing the accused a second time for trial, so as to give an opportunity for requiring bail a second time. The prosecution proceeds without bail. When the caution is found in the ordinary terms of "answering to any libel," it is held as applicable only to the first diet of appearance. If the caution do not extend to the prisoner's appearance "at all diets of court in such action," (the requiring of which before trial the act seems not to warrant) he must find caution of new, if the trial be delayed on being brought into court (*e*).

The *maximum* of bail fixed by the liberation act having become too small, in consequence of the fall in the value of money, it is by a later act fixed at L.1200 sterling for a nobleman; L.600 sterling for a landed gentleman; L.300 sterling for any other gentleman, burgess, or householder; and L.60 sterling for any inferior person (*f*). The bail required is fixed at the discretion of the judge at any sum not exceeding those.

For the amount of bail, during trial, see sect. In What Situations.

(*a*) Burnett, 341.

(*b*) Hume, ii. 93.

(*c*) Ibid. 92.

(*d*) Ibid. An opinion rather contrary is given by Mr Burnett, p. 340.

(*e*) Hume, ii. 92.

(*f*) 39 Geo. III. c. 49, sect. 1.

### III. WHAT INCUMBENT ON THE MAGISTRATE.

The magistrate must, within 24 hours after the petition comes into his hands, cognosce whether the crime be bailable, and what the amount of the bail shall be, the rules for which have just been mentioned (sect. To find bail). The cognition is only to the finding of bail (*a*), and has no effect on the subsequent disposal of the case upon a trial.

Sufficient bail being found by the applicant in terms of the deliverance on his petition, the magistrate is bound *immediately* to liberate him. The sufficiency of the bail is judged of by the magistrate's clerk of court in the first instance; if that person reject the cautioner as insufficient, and instruments be taken thereupon, and the prisoner again make application to the magistrate, in terms of the statute, for his immediate liberation, the magistrate himself must judge of it (*b*).

In practice those two parts of the magistrate's duty are usually performed in one warrant (on the prisoner's first application), finding the crime bailable, modifying the amount, and ordering his liberation on his finding sufficient bail to that amount.

No time is fixed by the statute for determining on the sufficiency of the bail; the party oppressed in this respect has action against the magistrate at common law.

The caution found is of course applicable only to the commitment stated in the petition, and does not prevent the prisoner being detained in gaol upon a separate warrant for any other offence.

If the magistrate fail in any of the points now mentioned; if he do not give a deliverance on the application within 24 hours; if he exact too high bail; if he refuse to grant warrant to liberate the prisoner on instrument being taken of the clerk having sustained the cautioner as sufficient; or if he reject a sufficient cautioner, on the clerk having also rejected him, and refuse to liberate the prisoner;—he incurs the penalties of wrongous imprisonment (*c*) (mentioned under *Commitment*).

### IV. CRIMINAL OF OTHER PARTS OF UNITED KINGDOM.

If any person be apprehended in one part of the united kingdom for an offence committed, or charged to have been committed, in either of the other parts, under warrant indorsed according to 13 George III. c. 31, or 44 George III. c. 92,

(*a*) 1701, c. 6.

(*b*) Hume, ii. 94.

(*c*) 1701, c. 6.—Hume, ii. 94.

(see *Arrest*, sect. In another part of the united kingdom), such person must be taken before the judge or justice who indorsed the warrant, or some other justice or justices of the county or place where it was indorsed ; and if the offence be bailable, and the offender be ready to find bail according to the exigence of the warrant, the judge or justice who indorsed the warrant, or before whom the offender is brought, may proceed with the offender, and take bail for him, as the judge who issued the warrant might have done ; and such judge must take the bail-bond in duplicate, and must deliver one copy to the person apprehending the offender, who is to cause it to be delivered to the clerk of the crown, or clerk of the peace, or other proper officer for receiving it belonging to the court in which, by the bail-bond, the offender is bound to appear ; and the judge taking bail must transmit the other duplicate to the Court of Exchequer of that part of the united kingdom in which bail was taken : and the court in which the person so bound to appear forfeits his bail-bond, must transmit a certificate, testifying the forfeiture, under the seal of court, or under the hand and seal of one of the judges or justices of the same, to the Court of Exchequer of that part of the united kingdom in which the bail was taken ; and that Court of Exchequer must levy the sum forfeited, as upon a bail-bond taken and forfeited within the same part of the united kingdom. If such offence be not bailable, or if the party cannot find bail, he must be remanded to the custody of the person who apprehended him, to be conveyed to that part of the kingdom where the offence was committed, under the acts above cited (*a*).

The judge, &c. granting the original warrant, must, on the applicant shewing to his satisfaction that there may be occasion to execute it in a different part of the united kingdom, write on the face of the warrant the words " not bailable," if the offence be not bailable. And where such words are not written, the judge before whom the offender is brought, under the warrant indorsed, may admit him to bail (*b*).

#### V. FORFEITURE OF BAIL.

When a person who has found bail to appear before justices of the peace fails to appear, his bail-bond is declared forfeited ; and warrant is granted for apprehending him. Inferior judges cannot *outlaw* for non-appearance (*c*).

(*a*) 45 Geo. III. c. 92, sect. 1.      (*b*) Sect. 2.      (*c*) Hume, ii. 66.

## VI. FORMS OF PROCEEDINGS.

1. *Petition for Bail.*

“Unto the honourable his Majesty’s justices of the peace for  
“the county of \_\_\_\_\_, the petition of C D.

“Humbly sheweth,

“That the petitioner has been committed” [or “is threatened to be committed”] “to the tolbooth of \_\_\_\_\_,  
“in virtue of a warrant granted by one of your honours, for  
“custody, in order to trial, for the crime of  
“alleged to have been committed by him, as is more particularly set forth in the warrant of commitment, a copy of which  
“is herewith produced; and that the petitioner is ready to find  
“sufficient caution, acted in your honours court-books, to appear and answer to any libel which shall be presented against  
“him for the said crime, at any time within six months, under  
“such penalty as your honours may modify.

“May it therefore please your honours to admit the petitioner to bail, and to grant warrant for his liberation accordingly.”

“C D.”

2. *Deliverance on Petition for Bail.*

[Place and date.]—“The justice having considered this petition, finds the crime with which the petitioner is charged  
“bailable; and, upon his finding sufficient caution acted in the  
“justice of peace court books of the shire of \_\_\_\_\_, that he  
“shall appear and stand trial for the said crime at any time within six months from the date of the bail-bond, under the penalty of \_\_\_\_\_ pounds sterling, grants warrant for his liberation.” [Or it may be more shortly expressed thus] “The  
“justice having considered this petition, admits the petitioner  
“C D to bail; and, on his finding caution in terms of law,  
“to the amount of \_\_\_\_\_ pounds sterling, grants warrant for his liberation.” [Where the prisoner has not a domicile within the jurisdiction, and where the judge apprehends that he may perhaps abscond, he adds] “and ordains the petitioner to assign a place at which, as a domicile, he may be  
“cited in the premises.”

“G H, J. P.”

[Or] " finds the crime with which the petitioner  
 " is charged not bailable ; and, therefore, refuses the petition."  
 " G H, J. P."

3. *Bail.*

[In this, and all similar cautionary obligations before justices,  
*c. g.* Lawborrows, *Meditatio Fugæ*, Surety of the Peace, the  
 usual form is that of a judicial enactment, such as the follow-  
 ing ; which is written immediately after the deliverance, or on  
 a separate paper, unless, as sometimes at the head borough,  
 there be a general bail-book for such purposes.]

[Place and date.]—" Compeared T V" [design him] " who  
 " judicially enacted himself cautioner in the justice of peace  
 " court-books of , in the penalty of , that  
 " C D" [design him] " shall appear and stand trial at any time  
 " and place to which he may be lawfully summoned within six  
 " months from this date, in any complaint or criminal prose-  
 " cution to be brought against him for the offence contained in  
 " the petition and information presented to the justices, where-  
 " on the warrant of commitment against him of date  
 " proceeded." [If a domicile be assigned] " And the said C D  
 " hereby judicially assigns at which, as a domi-  
 " cile, he may be cited, declaring that any citation left for him  
 " there shall be as effectual as if delivered to himself person-  
 " ally, or left at his own dwelling-place."

" T V."

[If a domicile be assigned, the prisoner also subscribes here.]

[Sometimes, particularly where there may be occasion to use  
 it in another county, the cautionary obligation is in the form  
 of a regular bond.]

" I, T V," [design him] " bind myself as cautioner" [as  
 above]. " And I consent to the registration hereof in all  
 " judges hooks competent, that execution may pass hereon.  
 " And to that effect I constitute  
 " my procurators, &c. In witness whereof, these presents,  
 " written" [or " written on this and the preceding  
 " pages," if more pages than one] " by  
 [design him] " are subscribed by me at , the  
 " day of , years, before  
 " these witnesses, N O and P Q" [design them].  
 " N O, witness.  
 " P Q, witness."

" T V."

See *Liberation.*

## BANKRUPTCY.

*Sequestration.*—A few points in the execution of sequestration of the estates of insolvent traders and manufacturers, under the bankrupt act (a), are committed to justices of the peace.

The creditor applying to the Court of Session for sequestration must produce his grounds of debt, or a copy of the account, signed by him, and a deposition by him before any judge ordinary "or justice of the peace," to the verity of his debt, and to his belief that the debtor falls within one or other of the descriptions in the act, mentioning which (b).

When the Court of Session appoint the first meeting of the creditors for choosing a factor, they grant commission "to any "resident magistrate of the burgh, or to the sheriff-depute or "substitute of the county where the meeting is to be held; or "failing them, any justice of the peace of the county, to attend the said first meeting of creditors, and to receive their "grounds of debt, with the oaths of verity thereon after mentioned, and to sign the minutes of the creditors along with "the preses chosen by them" (c).

In the oath of verity, "the creditor deponing shall specify "every security he holds for his debt, whether on the estate "of the debtor or other obligants, and shall swear that he "holds no other security than is mentioned in his oath." These oaths may be taken before any judge ordinary, or justice of the peace; and when the creditor is out of Great Britain and Ireland, or is under age, or is incapable to give an oath, an oath of credulity by his manager, taken in the same manner, is sufficient; and no fee is payable for the oath, or for production of the ground of debt, unless the debt exceed L.10 (d). (See *Affidavit*.)

A person sequestrated must, when required by the trustee, "declare upon oath before the judge ordinary, or any magistrate or justice of peace," whether any estate or effects have devolved upon him, by succession or otherwise, after sequestration (e).

*Fraudulent Bankruptcy.*—Fraudulent bankruptcy, or the wilful cheating of creditors by an insolvent person, or one who conducts himself as such, whether this be done by withdraw-

(a) 54 Geo. III. c. 137.

(b) Sect. 15, 18. The creditor will consult the act for those descriptions.

(c) Sect. 16.

(d) Sect. 53.

(e) Sect. 59.

ing his effects for his own use and behoof, or for that of others whom he is disposed unduly to favour, is punishable by the supreme civil court, or the court of judiciary, or the circuit courts, on a prosecution which cannot be brought without the concurrence of the Lord Advocate, with infamy, and the highest arbitrary punishment (*a*). Justices of the peace seem competent to *precognosce* for this crime; but it is believed that instances of their doing so have seldom if ever occurred; such investigations being usually conducted by the sheriff (*b*).

### BANKS FOR SAVINGS.

IN many parts of the country, banks for receiving the savings or deposits of labourers and others have been established, and have been found to be very beneficial, and to be free from certain objections attending Friendly Societies.

An act of Parliament has been passed with the intention of encouraging them; the only enactment of which, necessary to be referred to, is that which directs the rules of societies intending to take the benefit of the act to be exhibited to the justices of the peace at the quarter sessions for their sanction (*c*).

### BIGAMY.

BIGAMY is the contracting of a second marriage during the subsistence of a former. It would appear that, in the ordinary case, both marriages must have been by regular celebration; though there may be cases where this might not be necessary, as the contracting of marriage during the subsistence of a prior marriage, in which, though there had been no regular celebration, the other spouse had enjoyed that public, decisive, and invariable character, which hindered any doubt from being stirred upon the subject. The first marriage must be lawful and still subsisting. It will exculpate the accused that the first marriage was unlawful, or that it was dissolved by divorce (unless the divorce was obtained by the fraud of the accused, and is afterwards set aside), or that he believed on reasonable grounds that the first marriage was dissolved by death. It will not avail the accused that the second marriage is vitious

(*a*) 1696, c. 5.—Hume, i. 503.—7 and 8 Geo. IV. c. 20.

(*b*) The effects of *notour* bankruptcy (without sequestration), in cutting down fraudulent preferences, and in communicating the benefit of prior arrestments and poindings in certain cases (1696, c. 5.—54 Geo. III. c. 137, sect. 1, 2, 5), do not seem to fall within the jurisdiction of justices.

(*c*) 59 Geo. III. c. 62, sect. 2.

and exceptionable, *e. g.* incestuous, adulterous, &c. if it be formal and ceremonious. The second spouse and the priest are art and part of the crime if they knew of the subsistence of the former marriage. The witnesses also are art and part if they concealed the former marriage from the second spouse, or from the priest, who were ignorant of it. It may be more doubtful, and is undecided, whether the presence of the witnesses at the ceremony will implicate them, where all concerned are apprised of the true situation of things. The punishment is confiscation of goods, imprisonment, and infamy (*a*).

Justices of peace, of course, cannot try for so high a crime; but they may perhaps have occasion to prepare the case for a higher court. (See *Arrest*, &c.)

See *Marriage*.

### BILL OF EXCHANGE.

It can rarely happen that action upon a bill is brought before Justices; as the sum in bills is seldom within the amount allowed by the small debt act (under which alone it is competent before them), and as summary diligence is obtained as a matter of course on application to the courts competent, which they are not.

It is sufficient to mention in general that it is a written order by A upon B to pay a certain sum to D. B is commonly previously debtor to A. He signs the bill in token of acceptance. D often transfers or *indorses* the bill to E, by writing on the back "Pay to E, (signed) D." Sometimes E indorses to F, &c. The *bona fide* onerous holder of the bill is not affected by compensation or other personal claim by the acceptor against any of the prior indorsers. Sometimes a bill is used payable to A, as a convenient voucher of debt.

The creditor in a bill has recourse against the drawer and indorsers, by protesting it upon the failure of the acceptor. Although a bill is strictly due the very day on which it is made payable, and may therefore be protested on the day after, three days immediately ensuing the day of payment (or two, if the third day be Sunday) are indulged to the creditor, by protest, upon any of which he preserves his recourse, and which are called the *days of grace* (*b*).

Promissory notes have now the same privileges as bills (*c*).

(*a*) Hume, i. 455.—9.

(*b*) Ersk. iii. 2, 33.

(*c*) 12 Geo. III. c. 72, sect. 36, made perpetual by 23 Geo. III. c. 18, sect. 55.



It may be mentioned, that although, in the ordinary case, the person acquiring the property of any subject *bona fide*, and even for a valuable consideration, from one who has acquired it without the consent of the true owner, as by theft, must restore it to the true owner without any compensation from him, yet, in the case of bills and bank-notes, the *bona fide* onerous holder is free from any challenge on such ground (a).

See *Proof*, sect. Writing—*Prescription*, sect. Six Years.

### BLASPHEMY.

THIS crime consists in the denial of the being, attributes, or nature of GOD, or in the uttering of impious or profane things against GOD, or the authority of the Holy Scriptures.

Certain offences of this class were at one time punishable capitally by statutes (b); but these were subsequently repealed (c). The offence may be punished arbitrarily at common law, as being highly injurious to society (d): but specific punishments have been prescribed for this offence, along with *Leasing-making* and *Sedition*, by a later statute. (See *Leasing-making*; where the punishments, and the duty of Justices in such cases, are noticed.)

An act of Parliament has been passed for the more effectual prevention and punishment of blasphemous and seditious libels (e); but as the vigour of the common law of Scotland is sufficient for the punishment of all such offences, it is specially provided that the act shall not be held as in any respect altering the law of Scotland regarding the punishment of persons convicted of composing, printing, publishing, or circulating any blasphemous or seditious libel (f). The only part of the act which seems to concern Scotland, is that which authorises the Court of Justiciary to make order for seizing copies of libels, where sentence of fugitation for non-appearance has been pronounced (g).

It may be mentioned that, in order to restrain the abuses arising from the publication of blasphemous and seditious libels, an act was passed, subjecting certain periodical publications to the duties upon newspapers, and to certain regulations, under penalties which may be imposed by justices of the peace (h). But as those regulations are minute and detailed,

(a) Lambton and Company against Marshall and others, 21st June 1799.—Scott and Company against Kilmarnock Bank, 27th Feb. 1812.

(b) 1661, c. 21; 1695, c. 11.

(c) 53 Geo. III. c. 100.

(d) Hume, l. 559, 560.

(e) 60 Geo. III. c. 8.

(f) Sect. 10.

(g) Sect. 2.

(h) 60 Geo. III. c. 9.

## 48    BLASPHEMY.—BORDER WARRANT, &c.

and as it is probable they will be referred to before very few justices, and as the act will be produced by the Lord Advocate, or the officers of stamps, who alone can bring prosecutions, it seems sufficient to have referred to it.

See *Leasing-Making. Sedition.*

### BORDER WARRANT.

A creditor whose debtor is domiciled in England, and is transiently on the borders of this country, on making application to the Judge Ordinary, or any justice of the peace (*a*), of the jurisdiction in which the debtor is, stating that the debtor is domiciled in England, and has no estate or effects in Scotland, and mentioning the amount of his debt, and on his swearing to the verity of the debt, obtains warrant to commit him till he find caution *judicio sisti* (to appear personally) in any action for the debt to be brought within six months (*b*). A similar course is followed, on the borders of England, with Scots debtors.

It has been doubted how far this warrant is competent in Scotland, at the instance of an English creditor domiciled in England (*c*).

This warrant is so analogous to a *meditatio fugæ* warrant, that it is unnecessary to enter into details; and the proceedings are so similar, that it would be superfluous to give separate forms, as the requisite alterations are easily made.

It has been thought, that as it has of late become indispensable in the *meditatio fugæ* warrant to examine the debtor as to his *fuga* before granting warrant to incarcerate, it may generally be advisable in this warrant to examine him as to his being domiciled in England, &c. before granting warrant to incarcerate.

For arresting criminals on the borders, see *Arrest*, sect. Crime in another part of the United Kingdom.

### BREACH OF THE PEACE.

THIS term is commonly used to denote a mere brawl, or

(*a*) Bell against Robertson, 13th January 1676, Stair.—Potts and Hunter against Mitchelson and Robson, 20th July 1706, Fount.—and Practice.

(*b*) Ersk. i. 2. 19. 21.—Harries against Lidderdale, 7th March 1755. It is understood that justices seldom, if ever, grant border warrants to arrest the debtor's goods; that is done by the judge ordinary.

(*c*) Ford, 21st November 1758.

occasional quarrel and fighting, among persons who are assembled with no purpose of mischief to others. If a contest of this sort happen in such a place, or be carried so far as to disturb or alarm the neighbourhood, this is cognizable at the instance of the public prosecutor, to the effect at least of inflicting fine and imprisonment, and exacting caution from the offenders for their good behaviour for some time to come (*a*). It is provided by the general statutes with regard to the office of justices, that when the punishment to be inflicted by justices is to be a fine only, the fact may be referred to the oath of the accused; and that if the first summons be given him personally, or this not being the case, if a second summons be given him at his dwelling place, and he fail to appear, he shall be held as confessed, and fined as if he were present (*b*). But from the principles now established for criminal procedure (see *Process*) it seems to be at least doubtful whether procedure ought to take place in absence. Where the punishment is to be imprisonment, the procedure must be in the usual way. (See *Process*, sect. Criminal.—*Proof*, sect. Criminal.) A demand by the private party for damages is often conjoined with the public prosecution (*c*). See *Justices of the Peace.—Damages*).

For the arresting of persons guilty of breach of the peace, see *Arrest.—Constable*.

See *Riot—Surety of the peace—Surety for the good behaviour*.

## BREAD, &c.

### 1. WHEN THERE IS NOT AN ASSIZE.

#### 1. *Bread*.

(1.) *Kinds of bread*.—The justices of the peace, in their general quarter or petty sessions, may, from time to time, ap-

(*a*) Hume, i. 434.

(*b*) 1617, c. 8.—1661, c. 38.

(*c*) It was at one time, in consequence of certain statutes, unlawful to bear fire-arms. But those statutes have long been in dissuetude. (Hume, i. 439.) It was never doubted that a man might keep arms in his house for his defence. But a man may use fire-arms with such circumstances of alarm and danger as shall make him guilty of a breach of the peace. See *Treason*, sect. Unlawful Training to Arms, &c.

At a remote period, also, certain statutes were passed (1584, c. 138, and 1594, c. 219) forbidding battery *pendente lite*, or a party in a lawsuit assaulting or invading the opposite party, under the penalty of loss of his cause. But those statutes, which were more suitable to the state of society at that period than in more recent times, have now been repealed. (7 Geo. IV. c. 19.)

point which of the sorts of assize, or of prized loaves, and what other sorts of bread, and of what sorts of grain, shall be allowed to be made and sold within their jurisdiction, or any part thereof. Assize loaves are those of which the *size* or weight varies with the price of grain, the price of the loaves remaining the same, as twelpenny loaves. Prized loaves are those of which the *price* varies, the *size* of the loaves continuing the same, as quartern loaves. The order of such justices is to be entered in a book, which may be inspected by the makers of bread for sale, at all seasonable times of the day, without fee; and they are to cause a copy of it to be put up in some market or other public town of the place, or to be inserted in some public newspaper circulated there (*a*).

The justices of the peace, at any general or quarter sessions, may prohibit for three months (unless they see cause sooner to revoke the prohibition, which they may do at any adjourned quarter sessions, or any special sessions) the makers of bread for sale from making or exposing to sale any bread finer or dearer than standard wheaten. But no such order is to take place till one kalendar month after the date of making it. And such order is to be entered by those justices in a book, to be inspected by the bakers at all seasonable hours in the day time, without fee. And the justices are to cause a copy of such order to be put up in some market or other public town within the district, or cause it to be inserted in some public newspaper published within such district. And the bakers must have an opportunity, while such prohibition is under consideration, of offering to the justices their objections against it (*b*).

Bread made of the floor of wheat which, without mixture or division, is the whole produce of the grain, the bran or hull excepted, and which weighs three-fourth parts of the wheat of which it is made, may at all times be baked and sold, and is called standard wheaten bread (*c*).

Justices, &c. are forbidden to allow the making for sale or selling any sorts of *assize* bread, (*i. e.* bread of which the *size* varies, the price being fixed, *e. g.* sixpenny loaves) made of the flour of wheat, other than wheaten bread, or standard wheaten, as just mentioned, or household bread, and loaves of white bread of the price of twopence or under (*d*). Bakers are allowed to sell bread made of wheat in peck, half-peck,

(*a*) 3 Geo. III. c. 11, sect. 2.

(*b*) 13 Geo. III. c. 62, sect. 8, 9.

(*d*) 3 Geo. III. c. 11, sect. 3.

(*c*) Sect. 1.

quartern, and half-quartern loaves, made of the whole produce of the wheat, or with such proportions of the produce taken away as they may choose, at any price less than that of the wheaten bread of which an assize or price is set at the place. It is not subject to assize (*a*). Bread may be made of wheaten flour mixed with meal or flour of barley, rye, oats, buck-wheat, Indian corn, peas, beans, rice, or any other kind of grain, or with potatoes, in such proportions, and at such prices, as the seller chooses. It is called mixed bread (*b*). It is under the same regulations as other bread, as to marking, weight, and true making (*c*).

For forfeiture for improper kinds of grain, proportions, &c. see sect. *Forfeiture. Bad Bread, &c.*

(2.) *Assized and prized, not together.*—No loaves called assize loaves (as just described) can be made for or exposed to sale in any place where loaves called prize loaves (as just described) are allowed to be sold at the same time; that is, no threepenny and half-quartern loaves, sixpenny and quartern loaves, twelvepenny and half-peck loaves, eighteenpenny and peck loaves, can be made for or exposed to sale at the same time in the same place, that unwary persons may not buy the one kind for the other, under the penalty of from 10s. to 40s. (*d*).

(3.) *Weight.*—Every peck loaf of bread made for sale must weigh 17 lb. 6 oz. avoirdupois; half peck, 8 lb. 11 oz.; quartern, 4 lb. 5½ oz.; half quartern, 2 lb. 2¼ oz.; on pain of forfeiting, for each ounce wanting in any loaf, from 1s. to 5s.; and for less than an ounce, from 6d. to 2s. 6d.; if the same, in any city or town corporate, be brought before a justice, and weighed before him, within twenty-four hours after being sold, exposed to sale, or found in the custody of any person for sale, or within forty-eight hours after it has been baked, though not exposed to sale; and elsewhere than in cities, &c. within three days after being baked, exposed to sale, or found in any person's custody for sale; unless it be made out, to the satisfaction of the justice, that the deficiency of weight arose wholly from some unavoidable accident, or was occasioned by some contrivance or confederacy (*e*). Allowance must be made for the gradual loss of weight of the bread by drying, according to the time (to be proved by the baker or other

(*a*) 41 Geo. III. U. K. c. 12, sect. 1.

(*b*) 36 Geo. III. c. 22, sect. I.

(*c*) Sect. 3.—41 Geo. III. U. K. c. 12, sect. 4.

(*d*) 3 Geo. III. c. 11, sect. 1.—13 Geo. III. c. 62, sect. 3.

(*e*) 3 Geo. III. c. 11, sect. 6.—39 and 40 Geo. III. c. 74, sect. 4.

maker of bread, owner of it,) which has elapsed since it was baked, at such rate "as shall be just and reasonable," not exceeding the proportion of six ounces to a peck loaf (*a*). The extent of the allowance must generally be a question of circumstances.

Every white loaf of the price of twopence, or under, must weigh three parts in four of the weight of the wheaten loaf of the like price; and every wheaten assize loaf, of whatever price, must weigh three parts in four of the weight of every household assize loaf of the like price, on pain of forfeiting not exceeding 40s. (*b*). Seven standard wheaten assized loaves must weigh equal to eight wheaten assized loaves, or six household assized loaves of the same price, where these different kinds are on sale together, under a penalty not exceeding 40s. (*c*).

For forfeiture, see sect. *Forfeiture. Bad Bread, &c.*

(4.) *Price*.—No person can sell or offer to sale any bread of an inferior quality to wheaten bread, at a higher price than household bread sells for at that time and place, on pain of forfeiting not exceeding 20s. for each offence (*d*).

Every peck, half peck, quarter of a peck, and half quarter of a peck loaf, made for sale, of the flour of wheat, and called *wheaten bread*, must be sold in proportion to each other as to price; and loaves of *household bread* must be sold proportionally to each other, and for one-fourth less than wheaten bread of the same denomination, on pain of forfeiting for each loaf sold, or found in possession for sale, from 10s. to 40s. (*e*).

Where wheaten and household bread are sold at the same time with standard wheaten, if a certain weight of wheaten cost 8d. the same weight of standard wheaten must cost 7d. and of household 6d. under the same penalty of from 10s. to 40s. (*f*).

(5.) *Marking*.—Every wheaten loaf must be marked with W; household, or inferior bread, with H; standard wheaten with S W; mixed bread with X. If any person sell, or offer for sale, any such loaf unmarked, unless ordered by a purchaser to be rasped for his own use, he forfeits for every such loaf from 10s. to 40s. unless it appear to the justice that the not marking arose from some unavoidable accident, or was

(*a*) 39 and 40 Geo. III. c. 74, sect. 4.—c. 18, sect. 2.

(*b*) 3 Geo. III. c. 11, sect. 4.

(*c*) 13 Geo. III. c. 62, sect. 2, 5.—3 Geo. III. c. 11, sect. 4.

(*d*) 3. Geo. III. c. 11, sect. 7.

(*e*) 3 Geo. III. c. 11, sect. 5.

(*f*) 13 Geo. III. c. 62, sect. 2, 5.—3 Geo. III. c. 11, sect. 5.

occasioned by some contrivance or confederacy (*a*). Every loaf made of the meal or flour of any other grain than wheat, for sale, must be marked with some distinct letters, not more than two, as the justices direct; which order must be entered in a book, to which any maker of bread for sale may resort at all seasonable times without fee; and the justices must cause a copy thereof to be put up in some market or other public town, &c. or otherwise, must cause a copy to be inserted in some public newspaper published in the county, &c. in which such order is to be observed. Failing such order, the maker must mark the bread with any two distinct capital letters. The penalty is from 5s. to 40s. for every loaf not properly marked (*b*).

For forfeiture, see next paragraph.

(6.) *Forfeiture.—Bad bread, &c.*—If any loaves are found deficient in weight, or not marked according to the directions of this act, or deficient in baking or working, or wanting in the goodness of the stuff, or made with a mixture of any sort of meal or flour other than it imports to be, or made with a larger or other proportion of any other or different sorts of grain or meal than it ought to be, or fraudulently mixed with alum, or any thing else than the genuine meal or flour, and common salt, pure water, eggs, milk, yeast, and barm, or such leaven as any magistrate or justice, within his jurisdiction, allows, such loaves are to be disposed of to poor persons, within the jurisdiction of the justice convicting, unless the default be satisfactorily accounted for; and every maker or seller of bread faulty in the goodness of the stuff, kinds of grain, proportions, ingredients, or leaven, as above described, forfeits from L.1 to L.5 (*c*).

(7.) *Search for bread.*—Any justice of the peace, or any peace officer authorized by warrant of such justice, may enter into any house, shop, stall, bakehouse, warehouse, outhouse, or other place, belonging to any baker or seller of bread, and search and weigh any bread there found; and may view and search all bread found within their respective jurisdictions; and if any loaves be found, by oath of one witness, faulty in any of the respects described in the immediately preceding paragraph, may seize them, and the justice may dispose of them as there mentioned (*d*).

If any person obstruct or oppose any such search or seizure of such bread, he forfeits from L.1 to L.2 (*e*).

(*a*) 3 Geo. III. c. 11, sect. 8.—13 Geo. III. c. 62.

(*b*) 3 Geo. III. c. 11, sect. 9.

(*c*) 3 Geo. III. c. 11. sect. 10.      (*d*) Ibid.      (*e*) Sect. 11.

(8.) *Fault of journeymen and millers.*—If the baker make it appear to any justice, that any offence for which he has paid the penalty was occasioned by the neglect or default of his journeyman or servant, the justice is to issue his warrant for bringing such offender before him or some other justice; and on conviction, such justice is to order what reasonable sum shall be paid by the offender, by way of recompence; and if he do not immediately pay it, the justice is to commit him to the house of correction, or other prison of the place where he is apprehended, there to be kept to hard labour for any time not exceeding one kalendar month, unless sooner paid (a).

If any information be laid against any baker for making or exposing to sale bread, purporting to be standard wheaten bread, made of flour not the whole produce of the wheat, the bran or hull excepted, and weighing three-fourth parts of the wheat whereof it was made, and if he prove that he bought it for such flour of the miller, naming him and his place of abode, in such case the baker is to be acquitted, and the miller to forfeit from L.2 to L.5 (b).

## 2. Meal and Ingredients.

(1.) *Adulterating meal.*—Any person mixing, at any time, any thing with corn, meal, or flour, manufactured for sale, or knowingly selling or exposing to sale one kind of meal for another, or any other thing as, or mixed with, the meal which it ought to be, forfeits, for each offence, from L.2 to L.5, on conviction, as described under sect. Procedure (c), half to the informer, half to be applied by the magistrate, for executing the act (d).

(2.) *Unlawful ingredients.*—Every miller, mealman, baker, or seller of bread, in whose house, mill, &c. or possession any thing is found, which is adjudged by any magistrate or justice of the peace to have been lodged there with intent to adulterate the purity of meal, flour, or bread, on conviction by confession of the accused, or the oath of one witness, before such magistrate or justice, forfeits from L.2 to L.10, unless the accused satisfy the judge that it was put there for a lawful purpose. The judge may, out of the forfeiture, when recovered, publish the offender's name, residence, and offence, in some newspaper published in or near the place where the offence has

(a) Sect. 13.

(b) 13 Geo. III. c. 62, sect. 6.

(c) 31 Geo. II. c. 29, sect. 22.—13 Geo. III. c. 62.—41 Geo. III. U. K. c. 12.

(d) 32 Geo. II. c. 18, sect. 2.



been committed (*a*). The penalty to be applied half to the informer, half by the magistrate, for executing the act (*b*).

(3.) *Search for meal, &c.*—On information, on oath, that there is reasonable cause to suspect that any miller or manufacturer of meal for sale, or any baker of bread for sale, mixes with it any thing not the genuine produce of the grain which it imports, or ought to be, or by which the purity of the meal is hurt, any magistrate or justice, or any peace officer authorised by warrant of such, within their jurisdiction, may, at all seasonable hours in the day time, enter any house, mill, shop, bakehouse, stall, bolting-house, pastry warehouse, or outhouse of any such person, and search; and if any adulterated meal be discovered, it is to be seized, with all mixtures used or intended for its adulteration, and, if the seizure be made by an officer, instantly carried before a magistrate or justice; and if the magistrate or justice seizing, on examining a seizure, think the meal adulterated, he is to dispose of it according to his discretion (*c*).

Persons wilfully obstructing search or seizure forfeit from L.1 to L.5 for each offence—half to the informer, half, by order of the magistrate, for executing the act (*d*).

### 3. *Procedure for punishment.*

Any one justice may hear and determine the above offences with regard to bread, meal, &c. in a summary way, and may summon offenders; and if they fail to appear without reasonable excuse, may, upon oath of an offence, by one witness, grant warrant for apprehending them; and upon their appearance, or if they do not appear on notice left at their usual place of abode, or if they cannot be apprehended, the justice is to inquire into the matter, and to examine any witnesses on either side on oath, and to convict or acquit the accused; and if the penalty be not paid within 24 hours after conviction, the justice may grant warrant for levying it, and the expences, by distress; and if the offenders carry their goods beyond the jurisdiction, or so much of them, that the penalty cannot be levied, the warrant is to be backed by a justice within whose bounds there are goods of the offender, and these goods are to be distrained; and if, within five days after distress, the forfeiture and charges be not paid, the goods are to be sold, rendering the overplus to the owners, after deducting the penalty

(*a*) 31 Geo. II. c. 29, sect. 30.—13 Geo. III. c. 62.—41 Geo. III. U. K. c. 12. (*b*) 32 Geo. II. c. 18, sect. 2. (*c*) 31 Geo. II. c. 29, sect. 29. (*d*) 31 Geo. II. c. 29, sect. 31.—32 Geo. II. c. 18, sect. 2.

and charges of the prosecution, distress, and sale; which charges are to be ascertained by the justice before whom the offender is convicted, or by the justice who backed the warrant, if either of them continue alive; and if not, by some other justice of the place in which the offender is convicted; and for want of such distress, such justice, within whose jurisdiction the offenders are, on the application of any prosecutor, and proof of the conviction and non-payment of the penalty and charges, is to commit such offenders to the common gaol or house of correction of the place where they are found, for a month, unless payment be sooner made (*a*). The conviction is to be drawn up in the form commonly used for such offences.

Any person convicted may appeal to the next general or general quarter sessions of the place where judgment was given, and execution is to be suspended; the person so convicted entering into a recognizance at the time of such conviction, with two sufficient sureties, in double the sum adjudged, on condition to prosecute the appeal with effect, and to be forthcoming to abide the judgment of the sessions; and, if the conviction be affirmed, the person convicted must immediately pay the sum adjudged, with costs, to be awarded by the justices, otherwise any justice where he is may imprison him till he pay the penalty and costs, or compound for them with the informers; and if the conviction be discharged, reasonable costs are to be allowed against the informer who would have been entitled to the penalty, to be recovered as costs given at any general or quarter sessions are recoverable (*b*). If the conviction be within six days of the next general or general quarter sessions, the appeal may be either to them or to the next following (*c*).

Prosecutions must be commenced within three days after the offence; and no person prosecuted to conviction for any offence against this act can be prosecuted for it under any other law (*d*). Penalties and forfeitures go half to the informer, half as the justice shall think fit for carrying the act into execution (*e*).

#### 4. *What justices may act.*

No person concerned in the business of a miller, mealman, or baker, is capable of acting as a justice in the execution of the act with regard to bread, &c. under a penalty of L.50, to any one who informs and sues for it by summary complaint in the Court of Session (*f*).

(*a*) 31 Geo. II. c. 29.—3 Geo. III. c. 11, sect. 14.

(*b*) 3 Geo. III. c. 11, sect. 18.

(*d*) 3 Geo. III. c. 11, sect. 23.

(*c*) Sect. 19.

(*e*) Sect. 24.

(*f*) Sect. 12.

5. *Privileges of justices, &c.*

Certain privileges and protections are given to justices, peace officers, and others, in prosecutions for things done by them under the acts, with regard to bread, &c. It is sufficient to mention here in general, that prosecutions against justices must be brought within six months, upon notice of one month, and that within the month amends may be tendered; that prosecutions against peace officers must be brought within six months, upon notice of seven days, and that within the seven days amends may be tendered; and that other persons, when prosecuted, may plead the general issue, and recover double costs (*a*). If any prosecution be brought, the defender ought to consult the act.

## II. WHEN THERE IS AN ASSIZE.

Sometimes, in addition to the provisions which have been enumerated, an *assize* is set to regulate the *price* of bread. But it would be improper here to enter upon this subject, as the assize is in the use of being set only in one or two of the principal towns of Scotland, and as any detail which could be at all serviceable in practice, would far exceed the limits of this summary. The acts quoted below (*b*) will be consulted when the subject is taken up.

It may be just mentioned, that the assize is set in boroughs by the magistrates, and in case of their neglect to do so, when it appears proper, by the justices, and that in towns and places where there are not magistrates, it is set by the justices; that it is in the discretion of those persons whether an assize ought to be set; and that it is set according to certain tables, on a proof of the value of grain, flour, or meal.

## CAUTION.

CAUTION (questions with regard to which may occur before justices of the peace under the small debt act) is an obligation by which one becomes engaged for another, who has bound himself to pay a sum, or perform a fact, that he shall truly fulfil his engagement (*c*).

In certain public judicial and more formal engagements of this kind, writing is necessary; as in caution *judicio sisti*,

(*a*) Sect. 20, 21, 22.

(*b*) 31 Geo. II. c. 29.—32 Geo. II. c. 18, sect 2.—3 Geo. III. c. 6.—13 Geo. III. c. 62.—36 Geo. III. c. 22.—39 and 40 Geo. III. c. 74.—41 Geo. III. U. K. c. 12.—53 Geo. III. c. 116.—5 Geo. IV. c. 50.

(*c*) Erskine, iii. 3. 61.

caution at loosing arrestment, caution in lawborrows, and many others. It is also required in many cautionary obligations of a less formal nature, as in those for performance of an indenture, or of a tack, payment of a bond for borrowed money, and many others. The writing must be regular and formal where no performance by the creditor, or other *rei interventus*, has taken place upon the faith of it; but informality (if the subscription be admitted) is not fatal, if a *rei interventus*, *e. g.* liberation from the hands of a messenger, have followed on the faith of the obligation (*a*). In many important and common situations verbal caution is sustained, where the creditor has performed to the debtor upon the faith of it: in particular, in ordinary personal contracts, such as sale, location, &c. or where the execution of legal diligence, such as imprisonment or poinding, has been delayed by the creditor on the faith of such caution. This verbal caution, like other gratuitous obligations, can, in the ordinary case, be proved only by the cautioner's oath; *e. g.* where a person is alleged to have become cautioner for future furnishings (*b*). But it may be proved by witnesses where the principal obligation may be proved in that manner, as in sale, location, &c. and where it has been entered into at the same time with such principal obligation, and as part of that transaction (*c*); as when a person, at a verbal sale of cattle or grain, becomes cautioner for the price (*d*).

This obligation may be constituted indirectly. Thus one, by merely giving a mandate to lend money to a third person, becomes cautioner for him (*e*). It may be conditional. Thus one who has become bound either to present a debtor's person at a time and place specified, or to pay the debt, is not bound to pay unless he fail to present the debtor (*f*).

Where a person is bound simply as cautioner for a sum of money, he may demand that, before diligence is used against him, the principal debtor be discussed, his person by denunciation and registration of horning, his moveables by poinding, or by arrestment and furthcoming, and his heritage by adjudication; but he may be sued upon the same summons. Where he is bound as full debtor with and for the debtor, or conjunctly and severally with him, in whatever form of words,

(*a*) Brown against Campbell, 28th November 1794.—Brebner, petitioner, 18th January 1803.—Dunmore Coal Company against Youngs, 1st February 1811. (*b*) M'Ewan against Crawford, 13th February 1816.

(*c*) Kilkerran, page 451.

(*d*) Gibb against Walker and Simpson, 26th July 1751; Elchies, Cautioner, No. 19.—Bell, 13th November 1812.—Rhind against M'Kenzie, 20th February 1816.

(*e*) Ersk. iii. 3. 61.

(*f*) Ibid.

he may be sued without regard to the debtor (*a*). A cautioner for performance of a fact is not liable till the principal obligant be discussed (*b*), unless he expressly renounce the benefit of discussion.

All legal defences competent to the principal debtor are competent to the cautioner (*c*).

A cautioner who has paid has action for re-payment against the principal (*d*). A cautioner is not bound after his relief is cut off, or weakened, through the fault of the creditor (*e*). A landlord, however, does not lose recourse against his tenant's cautioner by delaying or neglecting to enforce his *hypothec* (*f*).

A tenant's cautioner who has paid the rent is entitled to an assignation, from the landlord, of his hypothec over the furniture, &c. (see *Hypothec.—Recompence*, sect. Relief of Cautioners). Where, therefore, the furniture belongs to a third party, and has been merely hired by the tenant, the owner of the furniture paying the rent is not entitled to an assignation of the cautioner's obligation from the landlord (*g*).

A cautionary obligation does not fall by the cautioner's death, but is continued against his heirs, even for a balance arising after his death (*h*).

See *Prescription*, sect. Seven years.—*Letter of Credit.—Recompence*, sect. Relief of Principals and Cautioners.

See also *Bail—Border warrant—Lawborrowers—Meditatio Fugæ warrant—Recognizance—Surety of the peace—Surety for the good behaviour*.

## CHILDREN.

QUESTIONS with regard to children may occur before justices of the peace under the small debt act, and with regard to the aliment of illegitimate children, independently of that act.

### I. LAWFUL CHILDREN.

#### 1. *Who are lawful.*

Lawful children are either such as are born in lawful wedlock, or a competent time after its dissolution; or such as,

(*a*) Ersk. iii. 3. 61. (*b*) Ibid. 62. (*c*) Ibid. 64. (*d*) Ibid. 65.

(*e*) Ibid. 66. (*f*) M'Queen against Fraser, 11th June 1811.

(*g*) Stewart against Bell, 31st May 1814, in App. of Fac. Coll. from November 1814 to November 1815.

(*h*) University of Glasgow against Sir William Miller, 18th November 1790.

though born illegitimate, are legitimated, or made lawful, either by letters of legitimation from the King (which, however, do not make the child lawful in all respects, but only remove certain disabilities), or by the subsequent intermarriage of their parents (*a*). Where, from the circumstances of the case, it is impossible that the husband can have been the father of the child, though born in lawful wedlock, the presumption of legitimacy in its favour falls (*b*). A child born after the expiration of six lunar months from the possible connexion between husband and wife, and before the end of ten months from that time, is held to be legitimate (*c*). A child born within six months after constitution of marriage, is presumed to be the husband's, if connexion between him and the mother before marriage was not improbable.

## 2. Powers, &c. of father.

A father is entitled to all the profits accruing from the labour and industry of his children, while they continue in his family, or are maintained by him at bed and board, or, at least, to a suitable reimbursement for their maintenance. But even then the children are capable of receiving donations, either from the father himself, or from others, which thereby become their own property. Children who get a separate stock from their father, for carrying on any trade or manufacture, or setting up a separate employment by themselves, are entitled, even though they should continue in his family, to the profits arising from that stock (*d*).

A father is the natural guardian, or, as it is called, administrator-in-law, of his children; not only their *tutor* while they are pupils, but their *curator* after they become *puberes*, till their perfect age. A minor cannot, for instance, bind himself apprentice without the express consent of his father, if he be alive. This power of the father extends to every estate which the children may get from any person, either by donation or by succession. But minor children may have a curator different from their father; either where they have a claim against him; in which case the judge will appoint a curator *ad litem* to conduct the action at law; or where an estate is left to them exclusive of the father's management. A father's right of administration to his minor daughter is transferred to her husband upon her marriage (*e*). The father's administration is restricted to those children who continue in family with him;

(*a*) Erskine, smaller work, i. 7. 36. 37.

(*b*) Stair, iii. 3. 42.—Erskine, i. 6. 50.

(*c*) Ersk. *ibid.*

(*d*) *Ibid.* 53.

(*e*) Erskine, i. 6. 54.

which a child is held to do though he reside elsewhere, if he do not earn his livelihood by his own labour, independently of any aid from his father. This right of administration requires no form of law to complete it. It is enjoyed only over lawful children. It ceases on the children reaching 21 years of age (*a*). Obligations by a minor son, without his father's consent, are not good even against himself. A person, for example, lending money to a minor son without the consent of his father, has no action for it against the son, except as far as it has been profitably applied for his use; which he would have independently of any express obligation. The son is not liable for superfluous furnishings made to him without his father's consent, even though he be in some measure emancipated, as by having a commission in the army (*b*). But a minor engaged in trade or merchandize may bind himself to a certain extent. (See *Minors*.)

### 3. *Obligations of Parents.*

A father is bound to maintain his lawful children. If any person furnish board and aliment to a child under puberty (14 if a male, 12 if a female), he has action for it against the father, but at no future period against the child. Failing the father, the mother is liable (*c*); but while the father has funds, though he be dead, they are liable. If the father and mother be both unable to maintain the child, the father's father is liable (*d*). A father is not bound to aliment a son's wife, unless the son himself be entitled to aliment (*e*). He is not bound to aliment his son's widow (*f*). In the lower walks of life, the father's obligation to aliment his children continues till they can, by herding or service, earn a livelihood for themselves. Persons in that station can seldom afford to give their

(*a*) Ibid. 55. (*b*) Johnston against Maitland, 20th November 1782.

(*c*) Bankton, l. 6. 16.

(*d*) Tait against White, 28th February 1802—Christie against M'Millan, 6th July 1802.

(*e*) Christie, *supra*; Duncan against Hill, 17th February 1810.

(*f*) Adam against Sir Andrew Lauder, 11th July 1764, Kames, No. 220—Duncan against Hill and others, 28th February 1809—Yule against Marshall, 21st December 1815. In a recent case, it was found that the proprietor of an entailed estate is bound to aliment the widow of his son, the mother of the heir of entail, as this situation was considered as preventing the connexion with the husband's family from being altogether dissolved by his death (De Courcey against Agnew, 3d July 1806). That decision is a precedent for a case of the same special circumstances only. It was appealed; but the appeal was not prosecuted; the proprietor having died, and the next heir, his grandson, being of course willing to aliment his own mother.

children an apprenticeship. In the higher walks of life, it continues till the son can maintain himself in some employment suitable to his station (*a*). Where the want of success is not the son's fault, the father must continue to provide him in necessary board and lodging in his, the father's, house, and other furnishings, as far as his own earnings are insufficient; for which furnishings, as far as necessary and suitable, the father is liable to those who make them to the son. If money be furnished to the son, the creditor must shew not only that it was necessary, but that, in fact, it was properly applied to the son's use. The minor's contracts for necessary furnishings are in all cases good against the father, where he has omitted to afford the necessary supplies. It seems doubtful whether, even though the son lives with the father, the furnisher can have any claim, if the son be properly provided by the father. Where the son lives apart from the father, as in town to finish his education, greater latitude is allowed; but even in that situation, neither the father nor the son are liable for furnishings superfluous or improper in their nature, nor for advances of money, unless the creditor shew that they were properly applied (*b*).

The above particulars with regard to the duty of parents to aliment their children have been mentioned, in case any action should occur under the small debt act (for it does not seem competent before justices otherwise) against parents for furnishings to children. An action among lawful relations to have an aliment modified is not competent before the justices.

#### 4. *Obligations of Children.*

The only obligation of children towards their parents, of which the law enforces performance, is that of alimentering them when they fall into indigence (*c*). This is in the same situation as the obligation of parents to aliment their children; and requires no farther illustration.

## II. ILLEGITIMATE CHILDREN.

### 1. *Who are Illegitimate.*

Children, not lawful, as before described, are illegitimate.

### 2. *Disadvantageous situation of Illegitimate Children.*

Illegitimate children have none of the privileges of lawful

(*a*) Ayton against Colvil, 25th July 1706, Fount.—Maidment against Landers, 25th May 1815.

(*b*) Scoffier against Reid, 26th July 1783. (*c*) Brown against Brown, 20th July 1710, Forbes.



children, whether succession, the father's administration (a), or any other. An obligation of any kind, granted by a minor natural son, without the consent of his putative father, is binding against the son.

### 3. *Aliment of Illegitimate Children.*

The father is bound to contribute his share of the expence incurred by the mother in maintaining his natural children. Failing father and mother, they must be supported by the parish. (See *Poor*.)

Justices of the Peace have, by certain old statutes, power conferred on them to punish persons guilty of fornication (see *Lewdness*); and, as guardians of the police, used at one time farther to imprison them till they gave security that the child should not burden the parish. From this has arisen a practice, sanctioned by inveterate usage, of their judging in actions brought, at the distance of years even, against the father, by the mother, or other person who has maintained the child, for repayment, with interest, of the expence incurred, though the chance of the child being a burden on the parish has ceased. There is a practice, in many parts of the country, of the kirk-session of the parish prosecuting the father for the aliment, and using the mother as a witness against him, where the mother has not the means of affording aliment. It has not yet been decided how far this practice is legal; but it seems to be reasonable and expedient, and would probably be sustained. It has been found, however, that a kirk-session is not entitled to pursue the father, unless a claim for the aliment of the child has actually been made against the parish (b).

The justices, in some parts of the country, still imprison for payment of the aliment; but it is thought, particularly after the decision in *Murray against Bisset* (see *Imprisonment*) that they would not be countenanced by the supreme court in using any diligence other than poinding and arrestment.

The father is also subjected to the mother in a half of the inlying charges, including an allowance for her aliment during her indisposition; which is commonly modified to L.2 or L.3, seldom less, sometimes more, according to circumstances (c).

With regard to the proof to be brought by the woman in her action, there can seldom, from the nature of the case, be direct evidence of actual connexion with the defender. All

(a) *Ersine*, i. 6. 55.

(b) Kirk-session of Garvald against Forrest, 14th February 1817.

(c) See *Burges against Halliday*, 4th March 1758.—*Short against Donald*, 21st February 1765.

the proof which she is required to bring is a *semiplena probatio*, or half proof of connexion with him between six and ten lunar months before the birth. And having brought such proof, she is allowed to give her oath in supplement that the defender is truly the father (see *Proof*, sect. oath in supplement); which, if affirmative, entitles her to judgment in her favour.

The *semiplena probatio* required "does not mean barely a "suspicion," "but must amount to such evidence as induces "a reasonable belief, though not complete evidence" of the connexion (*a*). It is plainly impossible to lay down any precise rules as to what facts amount to this evidence. But a case or two may be mentioned in illustration.

It has been found sufficient that the woman rose from bed one night, on being called by the defender, lighted a candle, and went out with him to light him to put his horse into a stable, and was out of bed a considerable time; and that on another occasion, a person passing the stable door heard the woman say "Had awa' Hugh," and believed that she was speaking to the defender; both of those occasions being within the necessary time before the birth (*b*). This is the case in which the court are thought to have gone farthest in favour of the woman.

On the other hand, it has been found not sufficient that, during the period when the child must have been begotten, the mother, a young woman of 20 years of age, lived as a servant with the defender, an unmarried man, and that no other person lived in the house (*c*). It has been found not sufficient that it was sworn by a single witness (along with other circumstances of intimacy of minor importance) that on one occasion, a competent time before the birth, the woman and the defender retired into a room with a candle, that the witness in about twenty minutes went to the door of the room, which was open, when he found that the candle was extinguished, and heard the woman call out "be canny," and heard a tittering, and that, soon after, the woman came out with her hair and clothes in a disorderly state; the court being of opinion that though, in the ordinary case, such circumstances would have been of weight if they had taken place in a private room, it was not probable that a married man, of a sober character, who had never been observed to treat the

(*a*) Craig against Crichton, 14th June 1809.

(*b*) Hunter against Watson, 15th January 1811.

(*c*) Bowie against Robertson, 1st December 1808.

woman immodestly, would expose himself by criminal intercourse in an open room, in which he generally transacted all his business with his customers, as a tradesman (*a*). It has been found, in a question as to the filiation of a lawful child, (which, though not directly in point, is analogous) that mere likeness to the alleged father is not a relevant allegation (*b*).

If the defender admit connexion with the mother, either prior to the tenth month before the birth of the child, or subsequent to the sixth month before it, this produces such a presumption of connexion during the necessary period as to entitle the pursuer to her oath in supplement, unless where strong circumstances occur in the particular case to exclude such presumption; because it is fully as strong a ground for inferring connexion during the necessary period, as many circumstances of familiarity during that period which would be held sufficient. Thus, where the defender admitted connexion a year and fourteen days before the birth, this was found of itself clearly to amount to such a *semiplena probatio* as to entitle the pursuer to her oath in supplement (*c*). Thus also, where the defender admitted connexion "about" six months before the birth, the court held that the time of the commencement of the connexion will be carried as far back as necessary, or as the circumstances of the case render possible; and found the mother entitled to give her oath in supplement (*d*).

It is a circumstance of considerable weight against the defender, if there be a material discrepancy between the declaration emitted by him, (which is commonly ordered in such actions), and the proof afterwards led; *e. g.* if he should deny meetings or familiarities which are afterwards proved to have taken place.

It will not free the defender, that he prove the mother to have had connexion with another man within the competent time.

After the pursuer has given her oath in supplement to the fact, that the defender is the father of her bastard child, it is not competent to examine her at large on the circumstances of the case (*e*).

The mother of a natural child, who had made no claim upon the father, on account of it, for 15 years, was found en-

(*a*) Craig against Creighton, 14th June 1809.

(*b*) Rutledge against Carruthers, 20th January 1810.

(*c*) John Hunter, petitioner, 24th May 1814; Fac.

(*d*) Petrie against Robertson, 22d December 1825; Fac.

(*e*) Jameson against Barclay, 14th January 1820.

titled to demand from him, at the end of that period, her in-lying expences, and the expence of maintaining the child for those 15 years (*a*).

The allowance to natural children depends upon circumstances. In the case of artisans, it generally runs from L.4 to L.6 a-year, according to the expensiveness of the situation; commonly nearer L.6. Where the father is of a higher rank in life, and the mother of low condition, the allowance is L.100 Scots (*b*), or now commonly about L.10 sterling. Where the mother is also of rather a better station, the allowance is proportionally increased. It is payable quarterly per advance.

This provision is continued till the child can earn its bread. It has frequently been given at once for 14 years (*c*). A day-labourer's child was, in one case, allowed aliment only for 10 years (*d*). It is entirely a question of circumstances. The limitation first assigned does not prevent a second application, at the end of that time, where the child is still unable to support itself; for instance, where it is sickly.

#### 4. *Custody of illegitimate Children.*

The mother has the custody of an infant natural child (*e*). This is generally limited to seven years in males, and to ten in females (*f*). It is very doubtful whether, after that time, the father is entitled to insist on taking the child from the mother. Opinions unfavourable to his pretensions have lately been expressed (*g*). The mother has been preferred to the relations of the deceased father for the custody of a male natural child of 13 years of age (*h*). And the trustees appointed by the father have been found not entitled to the custody of a natural child in preference to the mother (*i*).

In practice, there are two methods sometimes used of forcing the mother to give up the child at the end of seven or ten years. Either the aliment is limited to that period; or, if extended farther, a qualification is added, that the father

(*a*) Finlayson against Gown, 7th July 1800.

(*b*) Paterson against Spiers, 29th Nov. 1782.

(*c*) Short, *supra*.—Paterson against Cochrane, 14th Feb. 1758.—Graham against Kay, 26th July 1740, Kilk. 4. Aliment.

(*d*) Oliver against Scott, 7th March 1778.

(*e*) Short, *supra*.—Burgess, *supra*.

(*f*) Glendinning against Flint, 19th November 1782.—Paterson against Spiers, 29th November 1782.

(*g*) Particularly in Goadby against M'Candy and others, 7th July 1815.

(*h*) Goadby, *supra*.

(*i*) Trustees of Dr Hunter against Ann Speed and husband, 2d Dec. 1820.

shall not be liable beyond that period, if he will then take the child into his own keeping. But the propriety of these depends upon the father having right to the custody.

#### 5. *Power of Mother to bind Father.*

There is no presumption that the mother of a natural child, living apart from the father, has a mandate to receive furnishings on his credit. He may, however, make it otherwise, as by ordering the articles, or by being in the practice of paying her bills.

#### 6. *Obligations of Natural Children.*

Whatever may be their obligations with regard to their father, natural children are bound to maintain their mother, if she be in indigence.

For guardians of children, see *Minors*.

For the punishment of children for crimes, see *Crimes in general*.

### CLERK OF THE PEACE.

THE Clerks of the Peace in Scotland are named by the Secretary of State (*a*). The principal clerk of a county appoints the depute or district clerks; and, failing his doing so, the justices appoints a clerk for the time.

It is the duty of the clerk to attend the court, and to keep the books of record, and to register in them certain things which require to be so registered; the enumeration of which it is unnecessary here to enter upon.

See *Districts*.

### COIN.

For the treasonable offences against the coin, see *Treason. Coining, &c.*—Coining brass or copper money is punishable, certainly with a severe arbitrary punishment, perhaps capital-ly (*b*). The offence, as in other cases of coining, is complete

(*a*) 1685, c. 16.—1686, c. 20.—1690, c. 28.—and the present practice.

(*b*) Hume, i. 555–6.

without uttering, or attempting to utter (*a*). The coin must be in imitation (though with small differences) of a national coin, and intended to pass for such (*b*). Though counterfeiting foreign gold or silver coin, not current here, is punishable as misprision of treason (see *Treason*, sect. Misprision) lightening, or impairing it, has only some lower punishment (*c*).

*Uttering*.—Knowingly to utter false British coin, counterfeited within the realm, is punishable arbitrarily, probably not capitally (*d*). If the utterer have entered into any combination with the coiner for a share of the profits of the whole adventure, he becomes art and part of the offence of coining (*e*). Knowingly to utter false British coin imported from abroad, is, of course, not more highly punishable than to utter such made within the realm (*f*). Knowingly to utter false foreign coin, current by proclamation, is punishable arbitrarily, probably not capitally (*g*). Knowingly to utter false foreign coin, current only by consent of parties, is punishable with some lower arbitrary punishment (*h*).

Giving false coin, as such, to an accomplice, is not uttering; though, if the accomplice have attempted to pass the coin as genuine, the person giving it to him is art and part of the uttering: But it is a crime of its own kind, and punishable arbitrarily (*i*).

The mere possession of bad money does not seem to be punishable; but it may often be a strong circumstance in proof of the offence of coining.

It does not appear that justices of the peace can inflict an adequate punishment for any of those offences. The most advisable course for them seems to be to put the case in train for trial before the Court of Justiciary, or rather to send it to the sheriff. See *Arrest*, &c.

See *Falsehood*.—*Tokens*.

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## COLLIERS AND SALTERS.

THOSE two classes of persons were at one time in a state of servitude. But, by an act of Parliament in 1775 (*k*), it is declared that individuals of their number who begin to work as

(*a*) Hume, i. 556.    (*b*) Ibid.    (*c*) Ibid. 558.    (*d*) Ibid. 557.  
 (*e*) Ibid.    (*f*) Ibid. 557.    (*g*) Ibid.    (*h*) Ibid. 558.  
 (*i*) M'Farlane, 16th July 1810.—Horne, 15th July 1814.—Hume, i. 29.  
 (*k*) 15 Geo. III. c. 28.

such after 1st July that year, shall be no otherwise bound than as other servants; and that individuals bound at that time shall, after expiry of periods long ago elapsed, be equally free, on obtaining decree in the manner there stated. It is further declared, that they shall have the benefit of the act 1701 (see *Commitment for Trial—Bail—Liberation*) which had formerly been denied them.

A subsequent act (*a*) makes farther provisions with regard to colliers. All colliers are free from servitude as if they had obtained decree under the act in 1775 (*b*). No diligence or action is competent for any sum lent to colliers, or other persons employed at collieries, by the coal-owner or lessee, or by any person on their behalf, or for any debt due by such colliers or other persons, which shall be acquired by the owner or lessee, or by others on their account, either previous to their engagement, or during the currency of it, and in view of it, except sums advanced to such collier or other person, during the currency of his service, for the support of his family in sickness (*c*). Coal-owners, or lessees, may detain from the wages one-twelfth part of the sums so advanced weekly till the principal be paid; and they have action for the balance, if the engagement expire before those sums be so paid up (*d*). Debts due by colliers and such other persons, at the passing of this act (13th June 1799) are not extinguished, but may be assigned, with consent of the debtors, to other coal-owners or lessees with whom they may afterwards engage. The vouchers of the debts, or a list of them, signed by the coal-owners or lessees, to be recorded in the sheriff-court books within three months after passing the act, otherwise to be null (*e*). No coal-owner or lessee of coal is to act as a justice under this act (*f*).

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### COMBINATION.

THE combination of workmen to raise their wages, to shorten their time of working, &c. by striking of work, was at one time prohibited by various statutes, chiefly applicable to England; and was found to be a crime in Scotland at common law (*g*). And some of the provisions in those statutes were directed against combinations among masters to lower wages.

(*a*) 33 Geo. III. c. 56.

(*c*) 39 Geo. III. c. 56, sect. 5.

(*f*) Sect. 9.

(*b*) Sect. 1.

(*d*) Sect. 6.

(*g*) Hume, i. 438-9.

(*e*) Sect. 7.

By the act 5 Geo. IV. c. 95, the laws with regard to combination, fixing the amount of wages of labour, and obliging workmen not hired to enter into work, were repealed, and certain provisions were made for protecting the free employment of capital and labour, and for punishing combinations interfering with such freedom. But that act not having been effectual was repealed (the former laws remaining repealed) and further provisions were made for similar purposes by the act 6 Geo. IV. c. 129.

By section 3 of this act, if any person shall, by violence to person or property, by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any workman to give up employment or work, or not to take employment or work; or shall use such means for the purpose of forcing or inducing any person to belong to any association, or to contribute to any common fund, or to pay any fine for not belonging to any particular association or contributing to any common fund, or to pay any fine for not complying with rules or resolutions for advancing or reducing the rate of wages, or lessening or altering the hours of working, or diminishing or altering the quantity of work, or regulating the mode of carrying on any business; or shall by such means, force, or endeavour to force, any person carrying on any trade, to alter his mode of carrying on his trade, or limit the number of his apprentices, or the number or description of his workmen; every person so offending, or aiding and abetting, is to be imprisoned, and may be kept to hard labour, for any time not exceeding three calendar months.

By section 4, this act is not to affect persons meeting for the sole purpose of settling rates of wages to be received, or hours of work to be employed by the persons meeting, or persons entering into any agreement, verbal or written, among themselves, for such purpose.

By section 5, similar provision is made for the employers of workmen meeting or agreeing as to rates of wages or hours of working.

By section 6, offenders may be compelled to give evidence, and are indemnified from prosecution for the offence.

By section 11, In Scotland, prosecutions under this act may be insisted on at the instance of the public prosecutor, and may be judged of either by two justices of the peace, or by the sheriff of the county within which the offence was committed.

By section 7, On complaint and information on oath, within six months after the offence, before one or more justices (or the sheriff) the person charged is to be summoned for a cer-



tain time and place, to be specified, and upon his failure to appear (it being proved upon oath that he was summoned personally, or at his usual place of abode, at least 24 hours previously) warrant is to be granted to apprehend him; or, if it appear proper, warrant to apprehend may be granted upon such complaint and information without any previous summons; and upon the person appearing or being brought before the justices (or the sheriff) or upon proof on oath of the person having absconded, so that the warrant could not be executed, the case is to be forthwith inquired into, and may be disposed of upon confession of the person accused, or the oath of one credible witness.

By section 8, On request in writing being made, witnesses are to be summoned for the time and place appointed; and upon failure to appear, or offer some reasonable excuse (upon proof on oath of their having been summoned 24 hours previously, personally or at their place of abode) or not submitting to be examined, may be committed to prison for three calendar months, or until they submit to be examined.

By section 9, Reference is made to forms of a conviction and commitment of an offender, and of a commitment of a witness, which are annexed to the act.

By section 10, Convictions before justices are to be transmitted to the next general or quarter sessions, to be filed.

By section 12, Any person convicted by justices may appeal to the next general or quarter sessions; and the execution of the judgment appealed from is to be suspended upon his entering into recognizances before the justices, himself in L.10, and two sureties in L.10 each, to prosecute the appeal, to abide the judgment, and to pay costs.

By section 13, No master in the particular trade or manufacture, concerning which the offence is charged, is to act as a justice.

### COMMISSION TO TAKE PROOFS, &c.

SOMETIMES the Court of Session grants commission to justices of the peace to take proofs.

“As commissioners are to act in this matter under the special authority of the Court, it is recommended to them to exercise their own judgement in the manner of conducting the proof, and particularly to allow no matter to be intro-

“ duced which is not pertinent to the cause, nor any unnecessary pleading or altercation about the competency of questions, or admissibility of witnesses ; and to check the parties if they attempt to load the proceedings with unnecessary evidence or superfluous matter of any kind. It is likewise recommended to them to attend to the rules of evidence,” (see *Proof (a)*) “ and to give their own deliverances, either *vivô voce*, or in writing, as they see cause, upon any debate which may occur ; it being always understood that their whole proceedings shall be subject to the after consideration of the court, upon application made by either party, in order to which, the commissioner himself, or those acting for the parties, may take such notes on a separate paper as they think proper, for the due information of the court ; but nothing shall enter the report but what the commissioner himself may think material.” (b).

“ If, in the course of taking the depositions, it shall appear to the commissioner that any witness is not disposed to tell the truth, or behaves in any unusual manner, it is recommended to him to take a note thereof at the time, by way of assistance to his memory, in case he should be appealed to on that subject, by either of the parties, when the proof comes to be advised ; or, if he thinks proper, he may annex the same to his report of the proof.” (c).

When the commissioner is at a loss whether a witness or a question ought to be received, an advisable course, at least if the proof be taken at a distance from Edinburgh, or during the vacation, is to take the evidence, and seal it up by itself. The objections and answers in such cases are written upon separate paper, and are not sealed up with the doubtful evidence.

Sometimes the commission is granted merely for the examination of a party. In that case, he is sworn in the same way as a witness ; but he is not purged of partial counsel, that being inapplicable.

Frequently parties or havers are examined before justices, upon a diligence from the Court of Session, for the production of writings. They are sworn in the same manner as witnesses ; but are not usually purged of partial counsel, as, whatever may be their situation in that respect, they are bound to exhibit the writings, or to answer proper questions with regard to them. The principal questions put to them are, whether they

(a) Also the author's *Treatise on the Law of Evidence*.

(b) Act of Sederunt, 11th March 1800, Art. 4 ; made perpetual, 22d June 1809.

(c) Act of Sederunt, 11th March 1800, Art. 7.

have the writs, or had them since the citation upon the diligence, or fraudfully have put them away at any time; and they must also answer "all special pertinent interrogatories, in relation to their having of the writs, or putting the same away, or as to their knowledge and suspicion by whom the same were taken away, or where they at present are." (a). If the writings be produced, they are mentioned in the deposition as produced, and as marked by the deponent and examiner as relative to the deposition; and are marked accordingly.

For the swearing of witnesses, and the objections to them, see *Proof*.

#### FORM OF REPORTING COMMISSIONS.

"At the day of  
 " one thousand eight hundred and years.  
 " In presence of A B, Esquire, one of his Majesty's justices of  
 " the peace for the shire of , Compeared  
 " C D, agent for the pursuer" [or as the case may be] " in  
 " the action depending before the Lords of Council and Ses-  
 " sion, at the instance of E F" [design him] " against G H"  
 " [design him] " and produced act and commission to the said  
 " A B for taking the proof in that cause; which commission  
 " the said A B having accepted, and having chosen P Q"  
 " [design him] " to be clerk to the commission, and administered  
 " to him the oath *de fidei administratione*; and J K, agent  
 " for the defender, being present," [or, " due notice, in terms  
 " of the commission, having been given to the agent for the  
 " defender"], " but he having failed to appear," [or as the case  
 " may be].

" Compeared L M" [design him] " married, aged forty  
 " years" [or as the case may be] " cited as a witness for the  
 " pursuer" [or " defender"] " who being solemnly sworn,  
 " purged of malice and partial counsel, examined and interro-  
 " gated, depones, That" [insert the deposition] " All which is  
 " truth, as he shall answer to God" [If he cannot write his  
 " name, add] " and depones that he cannot write."

" L. M.

" A. B. Comr.

" P. Q. clerk.

" Compeared N. O." [design him], &c.

(a) Act of Sederunt, 22d February 1688.

## 74 COMMISSION TO TAKE PROOFS, &c.

[Each page must be signed by the witness, commissioner, and clerk].

" This is the report of the act and commission in the action at the instance of E F against G H" [design them],  
" humbly reported by

" A B, Comr.

" P Q, clerk."

[When the commission is for taking the oath of a party upon a reference, the report may bear] " And presented act and commission to the said A B for taking the oath of verity of the defender" [or " pursuer"].

" Compared the said E F, defender, who, being solemnly sworn, examined, and interrogated, depones," &c.

[Where the commission is for taking the depositions of parties or havers upon a diligence for production of writings, the report may bear] " And presented act and commission to the said A B for examining havers, upon a diligence in that cause," &c.

" Compared," &c. " cited as a haver," &c.

" This is the report," &c.

[If the person examined produce the writings desired, the report may bear] " Who, being solemnly sworn, &c. depones, " That he has the writings called for, and now produces the same, being" [describe them] " which are marked by the deponent and commissioner as relative hereto," &c. [And the writing may be marked thus] [date] " This is the referred to in my deposition of this date.

" L M.

" A B, Comr."

[In reporting proofs, &c. sums and numbers ought to be expressed in words, not in figures].

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## COMMITMENT FOR TRIAL.

If a justice of the peace or other magistrate, on taking the declaration of a person charged with a crime and a preconviction

of the evidence, be of opinion, upon a careful consideration of the precognition, that it appears to afford sufficient grounds against the accused for bringing him to trial, he grants warrant of commitment *for trial* (a). Till then, there ought only to be a commitment *for examination*, which is governed by other rules, as formerly noticed. See *Arrest, Declaration, and Precognition*.

# I. REQUISITES BY 1701, c. 6.

Certain particulars are prescribed by the act 1701, c. 6, for commitment for trial. But there is a reservation in that act to justices of the peace, or other inferior magistrates, to take surety of the peace, or for good behaviour, as formerly, or to imprison in order to trial for indignities done to them, or to imprison vagabonds and masterful beggars, or to imprison for riots, batteries, and tumults, or for pickeries and thieving (under which terms is not included the theft of things of value, and where the higher punishments may be inflicted, and least of all, theft by violence (b)), according to the practice before the act; the persons committed for trial in any of these cases being still entitled to *bail and liberation* (c). Accordingly, a bailie was found not to have done wrong in committing without an information or an order in writing, the fact being, that he had been called from his bed at midnight to settle an affray in which the party complaining was engaged, and only ordered him to jail on his refusal to find caution, along with the others concerned, to appear next day and answer to the charge (d).

The following are the particulars prescribed by the act.

1. The warrant must proceed on a *signed information*. Although, while he is carrying on the precognition, the magistrate is certainly warranted to follow out his grounds of suspicion, and to commit, of his own motion, in the more temporary forms, the persons affected by them; yet, at the close of his inquiry, and before committing to custody for trial, he must be provided with the authority of a definite and written accusation of the suspected person. The application for this purpose is made, for the most part, in a petition or other complaint, signed by the procurator-fiscal or party, and praying for commitment of the person or persons named, as at his suit or instance. (See *Arrest, &c.*) There seems, however, to be nothing in either the words or the spirit of the statute that should confine the magistrate to the use

(a) See Hume, ii. 82.

(b) Burnet, 239.

(c) 1701. c. 6.

(d) Hume, ii. 82.

of this sort of information only, which cannot always be obtained at the time. In itself, the affidavit, signed declaration, or even letter, of the party concerned, or having cause of knowledge, if it properly describe the fact, and be duly referred to in the warrant, seems to be an equally sufficient ground of commitment; and indeed, unless he can shew cause for distrusting it, the magistrate could not safely decline to commit upon a charge of this description. In those instances where the procurator-fiscal applies, his information will protect the magistrate who commits in pursuance of it, so far as to take the case from under the letter of the statute 1701. And in any complaint which may nevertheless be made against that officer, or against him and the magistrate jointly, at common law, for rash, or partial, or malicious proceedings, they have to defend themselves upon the ground of the private information lodged with them, or of that which has been procured in the course of their official inquiries (*a*).

The information, in order to authorize *commitment for trial*, must be a direct charge of facts, not a vague statement of suspicions (*b*).

In any action by the person accused, against the informer or the magistrate, far less evidence is necessary to justify commitment, in order to trial, than is necessary for conviction of the accused; and, if the informer acted *bona fide*, and upon any reasonable ground of suspicion, he is not liable in damages, although the person accused should be acquitted: and the greater opportunity the person accused had to commit the crime, and the greater difficulty there was to guard against it, the more slender evidence is to be admitted to prove the fact, or to justify such a warrant (*c*). But, although the informer or the magistrate may be absolved from a claim of damages in such circumstances, still, as noticed in the beginning of this article, a magistrate ought not to grant such a warrant unless it may reasonably be considered that there are sufficient grounds against the accused for bringing him to trial.

2. The *warrant* must be in *writing*; and of course must be signed. A person imprisoned without a written warrant will recover damages from the judge committer, though there should be a sufficient cause of commitment (*d*).

(*a*) Hume, ii. 83, 84.

(*b*) Rae Mure against Sharpe, 10th July 1811.—Russell against Adie, 27th January 1739. Kilk. Delinquency, No. 4.—Burnet, 322.

(*c*) Jameson against Napier, 27th November 1747; Kilk. Delinquency, No. 11.

(*d*) Philip against White and Drummond, 23d June 1748. Kilk. Reparation, 4.

3. The *warrant* must express the *particular cause* for which the prisoner is committed. It will not be sufficient if the *warrant* say generally that the prisoner is charged with the crime of theft, murder, or the like: The particular fact must be set down in the *warrant* in a reasonable and sufficient manner, as the circumstances of the case allow; as, for instance, the murder of such a man, committed at such a time and place; or the theft of such and such things, taken from such a house, or the farm of such a person, at such a time, or the like (*a*). (See next paragraph.)

4. The messenger or executor of the *warrant*, before imprisonment, or the keeper of the prison receiving it, must *immediately* give a *just double* of the *warrant*, under his hand, to the prisoner *himself*. In practice, the ordinary, and to the prisoner, the most advantageous way of arranging this part of the business, is by subjoining the *warrant* to the information to which it refers, and serving him with a copy of both. But this, though right in itself, and usual in those situations which allow it, does not seem to be necessary in compliance with the statute. If the *warrant* reasonably specify the charge, and refer to the information, as proceeding from such a person, so that the prisoner knows against whom to proceed in taking measures to hasten his trial, it seems to be due fulfilment of the law (*b*). The *warrant* ought not to be subjoined to the pre-cognition. As the penalty applicable to this article is only imposed on the officer or jailor "refusing" the copy, it is not the practice of the Court of Justiciary, or of the inferior courts in general, to furnish the copy unless it be demanded.

In case of detention on a *warrant* which is defective in any of the points above mentioned, the judge granter, and officer executor, and the keeper of the prison, are liable in the pains of wrongous imprisonment, as are also the officer and the jailor refusing to give to the prisoner a copy of the *warrant*, even though it be a legal *warrant*. These pains (which cannot be modified) are L.6000 Scots (L.500 sterling) for a nobleman, L.4000 (L.333. 6s. 8d. sterling) for a landed gentleman, L.2000 (L.166. 13s. 4d. sterling) for every other gentleman and burgess, and L.400 (L.33. 6s. 8d. sterling) for other persons (*c*).

The prisoner detained upon such defective *warrant*, as it is

(*a*) Hume, ii. 83.—John Rae Mure against Sharpe and others, 10th July 1811.

(*b*) Hume, ii. 83.

(*c*) 1701, c. 6.

null, has right to his release in the speediest and most summary form of application. Accordingly, the Court of Justiciary have given relief in such cases upon such summary application. Where the commitment is palpably illegal, the Court liberate instantly. Where inquiry is necessary, previous intimation is made to the party concerned, and also to the judge, if the defect alleged is the want of a signed information (a). An inferior court which has committed improperly seems entitled to liberate.

The Privy Council, or any five of them, may commit without regard to the provisions of this act, "in the case of imminent or actual invasion, rebellion, or insurrection," any person suspected of accession to such attempts; but such person has still the benefit of the act to obtain *Liberation* (b).

It is noticed under *Wrongous Imprisonment*, that, by the act above cited, close imprisonment, that is, solitary and inaccessible imprisonment, where access is denied to friends and agents, beyond eight days from the time of commitment, is prohibited.

## II. PARTICULARS NOT PRESCRIBED BY 1701, c. 6.

It is proper that a warrant of commitment for trial bear the date, the quality of the magistrate, the officers to whom addressed, the gaol to which the person is to be carried, and the conclusion of the prisoner's confinement, *till liberated in due course of law* (c).

The warrant, where it is granted separately, and either it or the signed information, where it is annexed to the information, must specify the name and designation of the person to be committed (d); for general warrants, or blank warrants, as stated elsewhere (*Arrest*) are illegal.

## III. FORM OF WARRANT OF COMMITMENT FOR TRIAL.

[This warrant is usually subjoined to the petition or other signed information, as noticed in the text. In such cases it may be as follows]

[Place and date] "I, G H, Esquire, of \_\_\_\_\_, one  
" of his Majesty's justices of the peace for the county of \_\_\_\_\_  
" having considered the foregoing petition" [or "information."  
"tion."] [If it do not clearly appear from the information,

(a) Hume, ii. 84-5.

(c) Hume, ii. 84.

(b) 1701, c. 6.

(d) Ibid. 82.



what are the name and designation of the informer, so that the prisoner may know against whom to proceed in taking measures to hasten his trial, these must be distinctly stated here] “ and “ the declaration of C D, complained upon, and the relative “ precognition,” [or as the case may be] “ grant warrant to “ constables to commit the said C D, upon the charge of “ contained in the said petition,” [or “ information”] [where different acts are charged, or where different charges are deduced from the same act, *e. g.* murder, robbery, and theft, the warrant of commitment for trial ought to bear, that it applies to all of them, or ought to specify to which of them it is limited] “ to the tolbooth of \_\_\_\_\_, the keepers “ whereof are hereby ordered to receive and detain him till liberated in due course of law.”

“ G H, J. P.”

[If the warrant be not subjoined to the information, it may be as follows]

[Place and date] “ Whereas, upon an information, signed by “ A B” [design him], “ C D,” [design him] “ is charged “ with the theft of \_\_\_\_\_ the property, or in the lawful “ possession of \_\_\_\_\_, at \_\_\_\_\_, within the county “ of \_\_\_\_\_, upon the \_\_\_\_\_ day of \_\_\_\_\_ [or as the case may be] “ I, G H, Esquire, of \_\_\_\_\_ one of “ his Majesty’s justices of the peace for the said county, having considered the said information, the declaration of the “ said C D, and the relative precognition” [or as the case may be] “ grant warrant to constables to commit,” &c. [as above].

See *Arrest, &c.* ; where commitment for examination is noticed.—*Bail.*—*Liberation.*—*Wrongous Imprisonment.*

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## COMMONTIES, DIVISION OF.

A **SUBJECT**, moveable, or immoveable, belonging to two or more persons, is said to be held by them in **common**, or **common property**. All such subjects are divisible by a proper action brought by any of the joint owners ; which, however, is not competent before justices of the peace.

A **common**, or **common**, as understood in ordinary lan-

guage, which is the present subject, is considerably different from such a common property. It is a piece of ground which belongs in property to one or more persons, and which usually is also burdened with sundry rights, inferior to rights of property, such as pasturage, fuel, &c. in favour of one or more third parties. The interest of such third parties could not be divided by any action at common law, not being rights of *property*. An act of Parliament was therefore passed, making such commonities divisible by an action before the Court of Session (*a*) ; and, in this division, shares of the property corresponding to the value of their interest are given, not only to those who have rights of property in the subject, but also to those having servitudes or inferior rights over it. Justices of the Peace, however, have no farther concern with this subject than that the proof of the state of possession may be remitted to be taken by them ; the Court of Session being empowered “ to grant commissions to sheriffs, stewarts, bailies of regality and their deputies, or justices of peace, or others, for perambulating and taking all other necessary probation.”

The facts to be investigated will always appear from the commission and relative papers. The rules with regard to evidence must be attended to.

A landlord is not entitled to claim from his tenant a share of the expence of dividing a commonity proportioned to the tenant's interest (*b*).

See *Proof*.—*Commission to take Proofs*.

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## COMPENSATION.

COMPENSATION (which is necessary to be known by justices, as they have civil jurisdiction to a certain extent) is an operation of the law, introduced by statute, by which, in certain cases, where two parties are mutually debtors and creditors to each other, their claims extinguish each other if equal, or leave only the balance due if unequal. The party in such a case, against whom action is brought, pleads his counter claim as an exception (*c*).

(*a*) 1695, c. 38.

(*b*) Drummond against Swanston, 18th July 1782.

(*c*) 1592, c. 141.—Ersk. iii. 4. 11.

## I. REQUISITES.

Compensation cannot regularly be received where the debts on both sides are not clear and beyond dispute. They must be ascertained either by a written obligation, the oath of the adverse party, or the sentence of a judge. The statute introducing compensation requires that the counter claim be instantly verified; but, by practice, if the counter claim require only a short discussion to constitute it, sentence is delayed, that the defender may have an opportunity of doing so, even in some cases, where a proof by witnesses is necessary (*a*).

The parties must be debtor and creditor to one another at the same time. Thus, if John owed James a sum, which James assigned to another, and if, after the conveyance was intimated, John should become creditor to James, John cannot plead compensation against the assignee upon the debt due by James to John (*b*).

Each of the parties must be both debtor and creditor in his own right; for example, when a tutor owes a sum on his own account, he cannot compensate it with a debt due by his creditor to the minor (*c*). In like manner, a person who has been subjected in a fine to the procurator-fiscal cannot plead compensation upon a debt due to him by that person in his individual capacity. An executor confirmed is in this question held to be the same person with the deceased (*d*).

One who has several debts in his person, upon which compensation can be pleaded, may plead it upon such of the debts as he judges most for his interest; for instance, on those which are the least secured, even though the first concourse was made by the others (*e*).

Where there has been a concourse, though the creditor should afterwards assign his right, and the assignee should complete the transference by intimation, compensation may be pleaded by the debtor against the assignee upon the debt due by the cedent.

Compensation takes no place in debts which are not of the same quality. It is generally understood of one sum of money with another, though it may be received of fungibles, as quantities of corn, provided they be of the same good quality. A sum of money cannot be compensated with a quantity of grain, or any thing of a different nature from itself; because, till the prices are fixed, the two sums are incommensurable. But in this case some short time would probably be indulged, to him who pleads the compensation, for ascertaining the conversions

(*a*) Ersk. iii. 4. 16.(*b*) Ibid. 14.(*c*) Ibid. 13.(*d*) Ibid.(*e*) Ibid. 12.

or liquidation, in order to make his debt a proper subject of compensation (*a*).

An absolute and pure debt, already payable, cannot be compensated with a conditional debt; or one whereof the term of payment is not yet come (*b*).

An obligation to deliver a special subject cannot be compensated by an obligation to deliver another subject, though of the same kind. Nor can it be compensated by an obligation to deliver a sum of money. Thus, if A have become bound to deliver a horse to B, as by sale, he cannot refuse to deliver it, on the ground of a separate money debt of equal value due to him by B.—(See *Retention*.)

## II. CIRCUMSTANCES BARRING COMPENSATION.

From the exuberant trust implied in deposit, compensation cannot be pleaded against the depositor. Neither can it be pleaded against the possessor of a note payable to the bearer, by the debtor, upon a debt due to him by any of the former possessors of it. Nor can the acceptor of a bill plead compensation against the holder upon debts due to him by the indorser (*c*).

Compensation is not admitted on a debt extinguished by prescription at the time of pleading it, though not extinguished at the period of concurrence (*d*).

Where the concurrence is made by the debtor acquiring a debt due by his creditor, compensation is rejected, either where a bad intention is presumed against the acquirer, or where the compensation, if admitted, would evacuate the legal diligence of third parties. Thus, a factor who is sued by his constituent for intromissions, cannot offer compensation upon a debt due by that constituent, and acquired by the factor after recovering the rents sued for; and the debtor of a person deceased, who has, after his creditor's death, acquired the right of a debt due by him, cannot plead it in a question with the other creditors of the deceased (*e*).

## III. WHO CAN USE IT.

Compensation may be pleaded not only by the immediate debtor, but by any person having a material interest in its being sustained; for instance, by a cautioner pressed for payment, upon a debt due by the creditor to the principal debtor.

(*a*) Erskine, iii. 4. 15.

(*d*) Ibid. 12.

(*b*) Ibid.

(*e*) Ibid. 18.

(*c*) Ibid. 17.

## IV. EFFECT.

Compensation, when admitted, extinguishes the mutual obligations from the time of concurrence downwards; and consequently stops the currency of interest from that date (*a*).

Where both debts are liquid in sums of money, but one of them not constituted by decree at first, the compensation, as far as regards interest, will operate back to the period at which the debt was due (*b*).

Where debts are of a different kind, and afterwards converted into money, the compensation can operate only from the period of liquidation (*c*).

## V. RECOMPENSATION.

A pursuer, when he is creditor to the debtor by a separate debt, which has not been included in the libel, may, if the debtor should plead any ground of compensation, elide his defence, by pleading recompensation upon that separate debt. Recompensation is governed by the same rules as compensation; but where recompensation is pleaded, matters generally resolve into an action of count and reckoning (*d*).

See *Retention*.

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## COMPETITION AMONG CONVEYANCES AND DILIGENCES.

It may be proper to say a few words with regard to preferences in competitions among conveyances and different diligences (for it is the priority of diligence, not of obligation, which determines the preference among personal debts) (*e*).

*Assignations*.—The preference among assignations depends on the priority, not of their dates, but of their completion by intimation or its equivalents.

*Arrestments*.—Arrestments are preferred among themselves according to their priority in date, though only of an hour or two, if the priority was clear (*f*), notwithstanding that the posterior arrestment has obtained decree of preference upon a com-

(*a*) Ersk. iii. 12.

(*b*) Ibid. 16.

(*c*) Ibid.

(*d*) Ibid. 19.

(*e*) Erskine, iii. 6, 1.

(*f*) Cameron against Boswell, 26th February 1772.—Goldie against Gibson and Balfour, 26th February 1779. Dict. iii. 45.

## 84 COMPETITION AMONG CONVEYANCES, &c.

petition, if it was not extracted (*a*). It makes no difference that some of the arrestments have been used before the debt arrested was payable. (*b*). Where a prior arrestment has been used upon a depending action, which is not yet brought to a conclusion, and a posterior arrestment has been used upon a decree or other liquid document of debt, and has been followed up by a process of furthcoming; in a competition, if the user of the former have been remiss in pressing his action, and especially if the interlocutors have been against him, the user of the latter will have decree; if the former have not been remiss, especially if the interlocutors have hitherto been favourable, the funds must remain *in medio* to await the issue of the process (*c*). (See *Bankruptcy, Note.*)

*Assignment and arrestment.*—Assignment granted by the common debtor is preferable to arrestment, if intimated before the arrestment is used. It is postponed to arrestment, if not intimated till after the arrestment is used, though granted before it. It comes in equally with arrestment, if intimated at the same time at which the arrestment was used (*d*). Priority of an hour or two is sufficient (*e*).

*Poidings.*—Poidings are preferable among themselves, according to the priority of attachment by the officer.—(See *Bankruptcy, Note*—Treatise on the duty of *Constables*, article Poiding). Poidings are not held to be completed, in competition with other real diligence, till the transference of the property to a purchaser or the creditor has taken place, and till a note of it has been lodged with the clerk (*f*). (See *Poiding*).

*Poiding and arrestment.*—Poiding used before decree of furthcoming is obtained upon an arrestment, excludes such arrestment, though it was not used till after the date of the arrestment, as it carries the real right to the poider; the arrestment only gives a personal claim. An order of the court to sell for behoof of the arrester, obtained in the furthcoming, puts the arrester out of danger from any poidings used after that time (*g*). Regular decree of furthcoming of course secures him.

(*a*) Lister against Ramsay, 26th July 1787.

(*b*) Watkins against Wilkie, 2d January 1728.

(*c*) See Baynes against Graham, 16th February 1796.

(*d*) Erskine, iii. 6. 19.

(*e*) Davidson against Balcanquhal, 30th January 1629, Durie.

(*f*) Tullis against White, 18th June 1817.

(*g*) Stevenson against Grant, 27th July 1767. Kamea.

*Executors creditors.*—Confirmations *qua executor creditor* from the commissaries are in ordinary cases preferred according to their dates. The creditors of the deceased using this diligence within year and day after their debtor's death are by statute preferable to those of the next of kin (*a*). Where an executor has been confirmed in a general character, as executor nominate or next of kin, the creditors of the deceased are preferable to his at common law upon the funds so confirmed (*b*).

*Executor creditor and arrestment.*—The preference depends on the priority of decree of furthcoming, or obtaining confirmation (*c*).

*Executor creditor and assignation.*—The preference depends on the priority of the confirmation, or of the intimation of the assignation (*d*). (See *Hypothec.—Servant.*)

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## CONSTABLES.

CONSTABLES are the officers of justices of the peace.

The justices are directed, at their quarter sessions (*e*), to appoint two constables at least for every parish, or more, according to their discretion; and in great towns, not being cities or free burghs (for in such it is prescribed as the duty of the magistrates), they are directed to appoint a number proportioned to the extent of the place (*f*).

The constables, upon their appointment, take this oath: “ I do swear that I shall faithfully and truly discharge the office of constabulary within during the time appointed me, and shall not, for favour, respect, or fear of any man, forbear to do what becomes me in the said office; and, above all things, I shall regard the keeping and preserving of the King's Majesty's peace, and shall, at every quarter session and meeting of justices,

(*a*) 1695, c. 41.

(*b*) Stair, iii. 8. 71.

(*c*) Carmichael against Mossman, 22d June 1742, Kilk. Competition, and Elchies, Arrestment, No. 19. Bell's Com. 3d edit. ii. 121. But see Erskine, iii. 6. 11.

(*d*) Sinclair against Sinclair, 5th July 1726, Home. Dict. i. 180.—Cust against Garbet and Company, 8th March 1775.

(*e*) This is often done by quarter sessions *adjourned to the neighbourhood*, when, from the extent of the county, it would be inconvenient to bring the constables to the head burgh.—(See *Sessions.*)

(*f*) 1617, c. 8—1661, c. 38.

"give true and due information of any breach which hath been made of his Majesty's peace, within the bounds of my commandment; and shall noway hide, cover, nor conceal the same, nor any of the proofs and evidences which I can give for the clearing and proving thereof. So help me God" (*a*).

The office having at one time been shunned, the justices were directed to change the constables from six months to six months, and to fine and imprison those who refused to accept. But it is now usually held till the officers acquire experience; and there has not for a long time been occasion to use compulsion.

The constables are punishable by the justices for neglect of duty, extortion, &c.—(See *Courts*).

With regard to the duty of constables, there is a summary of it lately published by the author of this treatise. To that is subjoined a summary of the duty of a private person in criminal cases.

## CONTRACT IN GENERAL.

A CONTRACT (questions with regard to which may occur before justices in the exercise of their civil jurisdiction) is the voluntary agreement of two or more persons, by which something is to be given or performed on one part for a valuable consideration on the other part.

Those who are incapable of consent, as pupils, idiots, persons absolutely drunk, &c. cannot contract. Consent is excluded by error in the essentials of the contract, by fraud, by violence, or the menace of violence (*b*). Things exempted from commerce by nature, by the destination of the owner, or by statute, cannot be the subject of obligation (*c*). No person can lay himself under an obligation to perform what is naturally impossible, or to do any unlawful or immoral act, which is said to be legally impossible. One undertaking such an obligation is not bound, and is not liable in damages. But all facts in themselves possible are the subject of obligation, though beyond the power of the party bound, who is liable in damages if he cannot perform (*d*).

(*a*) 1617, c. 8.—1661, c. 38.

(*c*) Ibid. iii. 3 83.

(*b*) Erskine, iii. 1. 16.

(*d*) Ersk. iii. 3. 84.



The degree of negligence which throws the blame upon any person contracting, so as to make him liable for the damage sustained by the other party, owing to the contract not having been fully performed, is fixed by the following rules. Where the contract is entered into for the benefit of both parties, as in sale, each party is bound to give that middle diligence which a man of ordinary discretion employs in his own affairs. Where only one of the parties is benefited by the contract, as in loan, he is bound to give that exact diligence which a man of the most consummate prudence employs in his own affairs; while the other party, who is no gainer, is only liable for dole (fraud or unfairness), or for gross omissions (*a*).

For the constitution of contracts, see each contract.—For their extinction, see *Payment, Compensation, Prescription*.—For the consequence of non-performance, see *Damages*.

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### COPARTNERY.

COPARTNERY or society (questions with regard to which may perhaps occur before justices under the small debt act) is a contract by which the several partners agree concerning the communication of loss or gain, arising from the subject of the contract (*b*).

Where a partner acquires a right in name of the company, the property is vested directly in the company. Any partner signing the company's firm binds the whole partners in ordinary acts of administration; but no partner can, without a special warrant from the company, bind them in acts of a different description (*c*).

Each partner is liable for all the debts due by the company, though exceeding the stock (*d*); and though, in an action against the company, all the partners must be called, any one of them is liable to instant execution for the whole debt, leaving to him his recourse against the others for their shares. The private creditor of a partner can only attach his share of the stock and profits, after deducting the company debts, which must first be paid (*e*). If the company creditors be not satisfied from the company funds, they rank for the residue upon

(*a*) Erskine, iii. 1. 21.

(*b*) Ibid. iii. 3. 18.

(*c*) Ibid. 20.

(*d*) Douglas, Heron, and Company, against Hair and others, 24th July 1778.

(*e*) Erskine, iii. 3. 24.—Bell's Com. 3d edit. ii. 536.

the funds of the partners, along with the private creditors of those partners (*a*).

To make the dissolution of a company effectual against the public, it must be publicly notified.

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## COURTS.

### I. OFFENCES AGAINST JUDGES OR OFFICERS.

It is hardly necessary to mention, for the information of justices of the peace, that it is treason to kill any of the Lords of Session or Justiciary sitting in judgment (*b*); that it is a capital crime to invade or pursue any of "his Highness's Session" for service done to the King in that capacity (*c*); or to strike or hurt any person in the Inner or Outer Parliament-House, during the sitting of the Lords of Session, or in the presence of the Lords of Justiciary sitting in judgment (*d*).

To strike or hurt any judge, when sitting in judgment, is capital (*e*). To strike any person in the presence of any inferior court is punishable with a fine of L.100 Scots, to be employed at the discretion of such court, and imprisonment during its pleasure (*f*).

"Even such inferior acts of insult, disorder, or contempt of judges, as do not fall under the sanction of any of these ordinances, are not, however, on that account, held to be below the cognizance of a criminal court, at common law. The bare appearance or preparation of violence, as by clenching the fist, or shaking a stick; the use of contumelious, reproachful, or threatening words; the challenging to fight; or the insinuating of mischief and revenge: any of these indecencies, offered to a judge or magistrate, though out of court, if on account of his judicial proceedings, and still more if in face of judgment, is a violation of the due reverence of his character, and a pernicious attempt to infringe on the freedom and impartiality of the court" (*g*).

The defaming of judges, or throwing any reflection against

(*a*) Bell's Com. 3d edit. ii. 538.

(*b*) 7 Anne, c. 21.

(*c*) 1600, c. 4.

(*d*) 1593, c. 177.

(*e*) Ibid.

(*f*) Ibid.

(*g*) Hume, i. 400.

the integrity of a court, is highly punishable. If relative to any proceeding which is at the time, or has lately been, depending in court, it may be punished there summarily (*a*).

“ Every judge, of whatsoever degree, has powers to punish summarily, and of his own motion, all such disorders or misdemeanours, committed in court during the progress of a trial, as are a disturbance of the judge in the exercise of his functions, or a violation of that deference which ought to be observed towards him, when proceeding in his office. The hindrance, therefore, or molestation of the officers of court, in their duty, the use of any threatening or contumelious speech or gesture there, with relation to the judge or the trial, any open expression of either censure or approbation of the proceedings of the judge or the jury, as by acclamation or otherwise; nay, the wilful and repeated breaking of silence in court: all these are examples of this sort of petulant contempt, for which the magistrate may reprove the delinquent of his own knowledge and upon the spot. All wilful disobedience or gross neglect of the orders and precepts of court, in matters relative to any trial, is, in like manner, necessary to be subdued without delay; otherwise, the course of justice would be liable to be stopped by the refusal of jurors to serve, or of witnesses to appear, or to answer, and in many other ways” (*b*). Every judge may repress, in the same way, all attempts which may be made, with relation to a trial recently or then depending, to slander the proceedings of the court, or to impose on their wisdom, and to pollute the channels of justice, to the prejudice of a fair trial, particularly to corrupt or withhold evidence (*c*). See *Perjury*. Upon this principle of judges vindicating their honour summarily, the Court of Session approved of the procedure of certain justices of the peace who, after a meeting of the justices was over, and when they were about to take horse, immediately returned into the house in which they had met, and directly sent the woman of the house to gaol, for very injurious language then used towards them, not personally merely, for in that case they could not have done it, but as in the office of justices (*d*).

Contempts committed in court may be punished summarily there, as by fine or imprisonment, on the motion and knowledge of the court themselves. Contempts committed out of

(*a*) Hume, i. 400.

(*b*) Ibid. ii. 135.

(*c*) Ibid. 136.

(*d*) Edward against Sir John Dalrymple and others, 3d June 1736. Kilk. p. 158.

court ought to be brought forward by summary complaint of the procurator-fiscal, and proved.

## II. OFFENCES BY JUDGES OR OFFICERS.

Bribery in a judge is punishable, in the case of an inferior judge, with "a discretionary censure, including, among other penalties, the loss of fame and office, beside payment of the party's cost, and reparation of his damage." By bribery is understood a judge's selling his judgment for good deed or reward to himself; meaning by this not only his taking a bribe to decide against his conscience, but, in general, his taking to shew favour in his office (*a*). It is punishable only by the Court of Justiciary (*b*).

Any of the inferior officers of court, such as clerks, procurator-fiscals, and the like, taking reward for shewing favour in his department, is punishable at common law, as for a species of falsehood and breach of trust, with as high penalties as those just mentioned. And upon such a charge, at least if it be relative to any recent occurrence, the judges of the court where the wrong happens are probably competent to determine, *de plano*, upon a summary complaint (*c*). In many cases, justices of the peace can hardly inflict an adequate punishment.

Giving, or even offering, a bribe to any one, whether judge or officer of court, whose station gives him a concern in the administration of justice, is highly punishable at common law (*d*). Such an offence, however, has rarely, if ever, been tried by justices of the peace.

Oppression or partiality of judges are subject to an arbitrary punishment (*e*) by the Court of Justiciary (*f*).

Judges and magistrates are also punishable by the Court of Justiciary (*g*), if they leave unperformed, or perform in a slack and insufficient manner, any known and capital point of their duty (*h*).

Officers of the law negligent of their duty are also punishable (*i*). Like all other courts, justices of the peace are the proper court for all offences, such as negligence, or extortion committed by their officers in the execution of their duty (*j*).

All inferior judges and their clerks are prohibited, not only from acting either directly by themselves, or indirectly by the mediation of any confident person, as procurators or agents before their several courts, in any cause depending before them,

(*a*) Hume, i. 401.

(*b*) Hume, ii. 56.

(*c*) Ibid. i. 402.

(*d*) Ibid.

(*e*) Ibid.

(*f*) Ibid. ii. 56.

(*g*) Ibid.

(*h*) Ibid. i. 404.

(*i*) Ibid. 405.

(*j*) Hutcheson's Justice of Peace, 3d edit. i. 177.

but also from giving partial counsel or advice in such cause, under the pains of law, for malversation in office, excepting in petitions or applications for commitment (*a*).

## CRIME IN GENERAL.

By a *crime* is understood any act for which, besides reparation to the private party injured (see *Damages*) the person guilty must make satisfaction to the public, as being an infringement of the social regard due to it (*b*).

### I. DOLE IS NECESSARY.

Dole, or malicious intention, which is essential to a crime, is a corrupt and malignant disposition, regardless of order and social duty (*c*). It is not necessary to prove an intention to injure the individual sufferer; thus it is murder though John be killed by mistake instead of James, unless the killing of James would have been justifiable or excusable (*d*): nor is it necessary to prove an intention to injure any one in particular; thus it is murder if a man, without sufficient cause, fire a gun among a crowd, or in a place of public resort, and kill a person (*e*): nor is it necessary to prove an intention to do the very mischief which has followed, if an intention appear to do some violent and atrocious mischief, and the event which has followed be not an unnatural consequence of it; thus it is murder if a man unmercifully beat another, who dies in consequence (*f*). Neither is it essential that the culprit have been fully aware of the wickedness of what he did, or have thought it wrong at all (*g*): or that he know what was the appropriate punishment, or that any punishment was the consequence (*h*).

### II. A WRONGFUL ACT IS NECESSARY.

There must also be a wrongful act in prosecution of such purpose. It is often difficult to decide how far the culprit must have proceeded.

On the one hand, the culprit is punishable (but not with the full pains of the completed offence) who, meaning to do

(*a*) Act of Sederunt, 6th March 1783.—See *M'Intosh* against *M'Kenzie*, 18th November 1815, and cases there referred to.

(*b*) Hume, i. 21.

(*c*) Hume, i. 21.

(*d*) Ibid. 22.

(*e*) Ibid. 23.

(*f*) Ibid. 23. *seq.*

(*g*) Ibid. 25.

(*h*) Ibid.

a grievous injury, advances so far as to do a considerable, though inferior harm ; for example, if he stab and wound, or administer poison, intending to murder (but these particular offences, as will immediately be seen, have been raised by statute from their rank at common law to the rank of capital offences) or if he assault, with the intention to rob, or if he break into a shop at night to steal, but is caught before he has displaced any of the goods (*a*). He is also punishable, although no harm have ensued, if there have been an inchoate act of execution, if he have done that, or part of that, by which he meant to perpetrate the crime, and which, if not defeated, would have done so ; as if he offer poison, or if he toss combustibles upon the stacks in a barn-yard, or if he instigate others to raise fire, or if he seriously attempt to seduce a servant to unfasten his master's house, that he may enter in the night and steal (*b*). But it is not fixed whether such inchoate act of execution, without actual harm, would be punishable in more venial trespasses, *e. g.* an attempt to pick pockets, or to steal linen from a hedge (*c*).

On the other hand, the law does not ordinarily take cognizance of those remote acts of preparation, such as procuring the instruments of homicide, house-breaking, fire-raising, forgery, or coining, which serve indeed to disclose a wicked purpose, but are not actual inchoate acts of execution, and leave time for repentance (*d*). And the same hold in general, even with regard to preparations, which, although of a continued and laborious nature, and serving to remove some of the main obstacles, are still distinct from the final perpetration, which requires a new effort, *e. g.* writing an incendiary letter if not sent, writing a libel, if not in any way published, and at common law (but see *Falsehood* for statutory provision) preparing forged bank notes (*e*).

But, between those extremes, there are many ambiguous cases, *e. g.* a man found in his neighbour's barn-yard at night, with tinder box and matches, though not yet kindled, or waiting armed at night, at a concerted spot, to rob and murder a certain passenger expected to pass that way (*f*).

By special statute, it is enacted, that, " if any person shall, " within Scotland, wilfully, maliciously, and unlawfully shoot " at any of his Majesty's subjects, or shall wilfully, maliciously, and unlawfully present, point, or level any kind of loaded fire-arms at any of his Majesty's subjects, and attempt, by " drawing a trigger, or in any other manner, to discharge the

(*a*) Hume, i. 26, 100. Note.

(*c*) Hume, i. 27.

(*d*) Ibid. 28.

(*b*) Ibid. 27.

(*e*) Ibid. (*f*) Ibid.

“ same at or against his or their person or persons ; or shall wilfully, maliciously, and unlawfully stab or cut any of his Majesty’s subjects, with intent in so doing, or by means thereof, to murder, or to maim, disfigure, or disable such his Majesty’s subject or subjects, or with intent to do some other grievous bodily harm to such his Majesty’s subject or subjects ; or shall wilfully, maliciously, and unlawfully administer to, or cause to be administered to or taken, by any of his Majesty’s subjects, any deadly poison, or other noxious and destructive substance or thing, with intent thereby to murder or disable such his Majesty’s subject or subjects, or with intent to do some other grievous bodily harm to such his Majesty’s subject or subjects ;” such person shall be held guilty of a capital crime, and be punished accordingly (a). And, by the same statute, it is enacted, that, if any person wilfully, maliciously, and unlawfully throw at or apply to any person any sulphuric acid, or other corrosive substance, calculated to injure the body, with intent to murder, maim, disfigure, disable, or do other grievous bodily harm, and where, in consequence, any person is maimed, disfigured, disabled, or receives other grievous bodily harm, such person shall be held guilty of a capital crime. But it is enacted that none of those offences shall be held to be ‘capital offences, if it shall appear upon the trial that they would not have amounted to murder, although death had ensued. And it is enacted, that nothing in this or any other statute enacting a capital punishment, shall affect the power of the prosecutor to restrict the pains of law (b).

By special statute, the attempting to kill officers of the navy or revenue, in the discharge of their revenue duty, is capital (see *Excise and Customs*, sect. Forcible offences).

Certain attempts to injure manufactures are made severely punishable by special statute. (See *Manufactures*, sect. Breaking into house, &c.—*Mischief, Malicious.—Riot.*)

### III. DEFECT OF DOLE.

In some cases there is a defect of dole, either absolutely or to a certain degree, and a consequent proportional freedom from criminality, and exemption from punishment.

#### 1. *Minority.*

Minors who have reached puberty, which, in this question, is 14 years both for males and females, are liable to the ordinary punishment, even capital, for those crimes, such as

(a) 6 Geo. IV. c. 121, sect. 1.

(b) *Ibid.* sect. 2.

## DAMAGES.

THE name of *damages* is commonly given to the reparation to which one man is entitled from another, by whose fault he sustains loss or injury.

A claim for damages being a mere civil claim, even though founded upon a delict, is not ordinarily competent before justices of the peace, otherwise than under the small debt act, except in one or two instances, in which (as mentioned under those instances) jurisdiction is conferred upon them by special statutes, independently of the small debt act. It is, perhaps, competent in certain cases, when prosecuted along with punishment of the offence. (See *Justices*, sect. Particulars not in Commission.)

The loss or injury may arise either, 1. From a man's failure to perform his part of an ordinary civil contract; or, 2. From himself, or others for whom he is answerable, being guilty of a delict or crime, or of a neglect of duty.

## I. BREACH OF CONTRACT.

In all obligations concerning things lawful, and in themselves possible, the obligant who fails in performance of his part must make up to the creditor the damage which he has sustained through the non-performance (*a*). Damages are due only for an obligation which has become imprestable; by which is meant that, while it is possible to fulfil the contract as agreed upon, the party in whose favour it is conceived may insist for specific performance; and that the obligant has not his option whether he will fulfil his contract or pay damages. A penalty adjoined to an obligation does not give the debtor his option to pay the penalty and be free of his obligation, if it be still prestable (*b*).

Every thing by which a man's estate is lessened is damage or loss. Damage, therefore, includes expences of process, and all sums expended by the sufferer towards obtaining reparation; but it never ought to rise higher than the loss truly sustained (*c*). The extent of the damage, where there is no fraud in the case, ought to be estimated according to the real value of the subject, and not by the *pretium affectionis*, or imaginary value which the sufferer may put upon it (*d*). In estimating the amount, no damage which is remote or indirect ought to enter into the computation. Thus, for example, though the

(*a*) Erek. iii. 3. 86.    (*b*) Ibid.    (*c*) Ibid. iii. 1. 14.    (*d*) Ibid.



debtor's failing to make punctual payment should have drawn after it the utter ruin of the creditor, he can only demand his debt and the expence of recovering it. And a creditor is entitled only to interest for his money, not to any farther profit which he might have made of it (*a*).

Frequently the damages arising from breach of contract are not awarded against each obligant *in solidum*, where there are more than one, but *pro ratâ*, in proportion to the share which each had in the transaction. There seems no invariable rule on this point; but the judge will decide according to the justice of the case.

See *Contract in general*.

## II. DELICT, OR NEGLECT OF DUTY.

### 1. *By one's self*.

(1.) *Delict*.—Every crime by a man against his neighbour gives rise to two actions; one at the instance of the public prosecutor, or of the private party injured, with his concurrence, for punishment; the other (which is to be considered here) at the instance of the private party, for reparation of his damages, and *in solatium* of his grief and pain. To give an example; if a person be assaulted and hurt, he will have a good claim against the assaulter for the loss which he sustains by being disabled from following the occupation by which he earned his bread, for the expence of his cure, for that of his law-suit, if rendered necessary, and for a sum of money, in addition, as a *solatium* or compensation for his suffering.

Where the party injured can be restored precisely to his former state, that ought to be done: thus, if goods be wrongfully carried off, the party's damage is made up by having them restored, and by being reimbursed of the loss which he has sustained by wanting them, and of the expence of recovering them. Where that cannot be done, the judge appretiates the value in money; of which there are daily instances, where goods are destroyed or made worse by an accident, in any degree imputable to another (*b*).

It has been seen that damages from breach of contract are limited to the direct loss proved to have actually arisen. In

(*a*) Ersk. iii. 3. 36.—There are examples of this doctrine in the cases, *Robinson and Company against M'Cullochs*, 23d December 1808. *Anderson against Godard*, 21st Feb. 1809.—*Taylor against Morison*, 17th June 1809.—*Shirra and Mains against Harvey and Company*, 11th December 1807; noticed in *Taylor against Morison*, 17th June 1809.—*Dunlop against M'Kellar*, 31st May 1815.

(*b*) Erskine, iii. 1. 14.

damages from delict, the sufferer is more favoured. He is allowed to give his own oath *in litem* as to his loss, subject to the modification of the judge. Where one's property is injured or taken from him by a fraudulent delinquency, it ought to be valued beyond the price which it would bring in the market; as where trees near a gentleman's house have been cut down or hurt, which served for ornament or shelter (*a*). In certain cases, the pursuer is entitled to *violent profits*, i. e. to all the profits which he could possibly have made had his property not been withheld from him.

A person is liable for the full patrimonial damage which is the consequence of his offence, however unable he may be to pay it. On the other hand, the fine to the public, and even the *solatium* to the sufferer, ought to be proportioned to the delinquent's means. Thus, if a tradesman be assaulted by a poor man, he will have a full claim for the damage sustained by his being disabled from work, for the expence of his cure, and for the charges of his lawsuit; but the *solatium* for the pain and anxiety which he has undergone will be proportioned to the poverty of the offender.

All concerned in the wrong, whether as principals, or only as accessaries, and however small their concern compared with that of the others, are liable each for the whole damage (*b*). But this does not seem to prevent any individual concerned, who has paid the whole, from having recourse against the rest for their shares.

Where a delinquent is subjected by a statute to a determinate penalty, without mentioning a reparation to the party, the silence of the statute does not deprive him of his claim for reparation (*c*).

(2.) *Neglect of duty*.—Damage may arise, not only from positive crimes or acts of injury, but also from blameable omission or neglect of duty. Thus, a clerk of court, who has through carelessness lost the writings of a party, which were produced in process, must make up the damage (*d*). Thus, also, if damage be occasioned to property or passengers by a sign-post having been improperly put up, or by flower-pots falling from windows into the street, owing to their not having been properly secured, or by any accident of the same kind, the person who has been in fault is liable to repair the damage. A person receiving a material injury from falling during the night into a temporary pit made by certain builders, in one of the lanes of a borough, was found entitled to damages from the

(*a*) Ersk. iii. 1. 14.

(*c*) Ibid. 14.

(*b*) Ibid. 15.

(*d*) Ibid. 13.

magistrates, though considerable precaution had been used by those who dug the pit to prevent injury (*a*). If the damage have not been occasioned by some culpable act or omission of the party, there is no claim for it (*b*).

*2. Delict, or neglect of duty, by others.*

(1.) *Servant*.—A man is in many cases answerable civilly for the acts of his servant. For example, if the servant of a person living in a town occasion damage, as by throwing any thing over the window, the master, as well as the servant, is liable civilly for such damage; it being held that he is blameable for not maintaining better order in his household. In general, this responsibility applies only to wrongs from negligence, or otherwise, which have originated in the servant's situation as such, or where the service has aided him in the commission, or where the case can be supposed to have fallen under the master's own observation. But to such wrongs it applies very extensively. Thus, the servants of a proprietor living at a distance having employed fire to clear away some brush-wood, contrary to his express orders, or at least under a direction to be very cautious if they used fire for the purpose, and the fire having, notwithstanding considerable measures of precaution, spread to a neighbouring forest, he was found liable in the damage (*c*). Thus, also, the owner of a stage-coach was subjected to a great amount for damage done to a passenger on the top of the coach, in consequence of the coachman driving furiously, the Court being clearly and unanimously of opinion that masters are liable for damages sustained by the unskilfulness, malversation, or culpable negligence of servants, in matters entrusted to their charge (*d*). In like manner, a master was found liable in damages to the amount of L.40, besides the amount of the surgeon's bill, his carter having fallen a considerable distance behind his horse and cart, instead of driving them correctly, in consequence of which they strayed along the road, rather on the wrong side, and

(*a*) *Innes against Magistrates of Edinburgh*, 6th Feb. 1798.

(*b*) *Ersk. iii. l. 13*.—The judgment of the Court of Session, in *Smith against Milne*, 8th March 1810, finding the workman, for whose use an opening had been made in a wall, liable for damage arising from its not being properly fenced, was, on 6th July 1814, reversed by the House of Lords, because the accident did not happen till some time after he had left the work, and the opening was left for the use of the other workmen who remained there, and who used it accordingly.—*Dow's Reports*, vol. ii. p. 230.

(*c*) *Lord Keith against Keir*, 10th June 1812. See the explanation as to the report of this case in *Hamilton against Baird*, 4th July 1826.

(*d*) *Brown and others against M'Gregor and others*, 26th Feb. 1813.



knocked down a child of about three years of age, which was playing upon the road before its father's house, and injured it severely (*a*). But a proprietor of an estate has been found not liable for damages occasioned by a tree on his estate falling on a passenger on a highway, he being at a distance, and the tree being cut without his orders, and contrary to his wish; and indeed, in the circumstances of that case, the individuals who cut down the tree were assoilzied (*b*).

(2.) *Shipmasters, &c.*—The owners of a ship are liable for damage done to goods on board, by the acts or omissions of the shipmaster or mariners, in the course of their duty; as by running away with the ship, or by allowing the goods to be damaged by carelessness. But the owners are not liable for any act by the master or mariners, without their privity, beyond the value of the ship and the freight of the voyage (*c*). They are not liable for loss by fire on board (*d*). But the expressions of the act 26 Geo. III. c. 86, cited, limiting the responsibility, have been found only to apply to ships usually employed in sea voyages, not to small craft, lighters, and boats concerned in inland navigation (*e*). They are not liable for loss of gold, silver, precious stones, &c. unless entered as such (*f*). It has been doubted, however, whether such claims, being of a maritime nature, can be competently tried before any courts other than those of Admiralty.

(3.) *Others employed.*—One is also answerable civilly for damage by others employed to do work for him, if he was bound to be scrupulous in his choice, and to look narrowly after the persons chosen. Thus, if a tradesman, employed to build a house in a town or frequented place, neglect properly to secure the foundation, the employer is civilly liable as well as the tradesman. On the other hand, a person is not answerable for the misconduct of an agent or messenger employed by him in executing a diligence, unless he was privy to it (*g*); because those persons are recommended by public authority, as properly qualified, so that the employer is not bound to be so scrupulous in his inquires.

(4.) *Vicious animal.*—A person is liable for any damage

(*a*) Hamilton against Baird, 4th July 1826.

(*b*) Linwood against Hathorn and others, 14th May 1817.

(*c*) 7 Geo. II. c. 16. sect. 1.—26 Geo. III. c. 86, sect. 1.—53 Geo. III. c. 169.

(*d*) 26 Geo. III. c. 86, sect. 2.

(*e*) Hunter and Co. against M'Gown and others, 16th May 1811; as remitted by the House of Lords 12th July 1819.—Bligh's Reports, vol. 1. p. 573.

(*f*) 26 Geo. III. c. 86, sect. 3.

(*g*) Stewart against M'Donald, 6th July 1784.

done by a vicious animal belonging to him, as by his dog hurting persons or killing sheep (*a*).

(5.) *Injury to growing timber*.—Some instances of responsibility have been introduced by statute, in order to preserve growing timber; viz. against the haver or user of any tree cut, broken, pulled up, or peeled in the bark; against tenants and cottars; and against the inhabitants of the parish, &c. where any tree is maliciously broken, cut up, barked, or spoiled; for which see *Planting and Enclosing*, sect. Injuring Trees; sect. Tenants answerable for Family; and sect. Damage from Parish.

(6.) *Riots*.—The counties, cities, and boroughs, in which damage is done by rioters to churches or chapels, or any buildings for religious worship, tolerated by law, or to any dwelling houses, barns, stables, or other outhouses, are answerable for the damage (*b*), (see *Riot*, sect. Riot Act). This is extended to wind saw mills, and other windmills, and water mills, and other mills, and any of the works belonging to them, demolished or pulled down wholly or in part by rioters (*c*); and to erections and buildings or engines used in carrying on any trade or manufactory of goods of any kind, or in which goods of any kind are deposited, demolished, or pulled down by rioters, or begun to be so (*d*); and to fire-engines, or other engines for working coallieries, coal mines, or other mines, and to bridges, waggon-ways, &c. used in carrying coals and minerals, and to buildings for depositing coals or minerals, or used in managing the business, and whether such engines, bridges, buildings, &c. have been completed or not, pulled down, destroyed, or damaged by rioters, or begun to be so (*e*); and to houses, shops, or other buildings destroyed, or in any manner damaged, and to any fixtures attached thereto, and any furniture, goods, or commodities whatever therein, which are destroyed, taken away, or damaged by rioters (*f*).

(*a*) In one case (*Turnbull against Brownfield*, 6th December 1735, *Elchies, Reparation*, No. 1.), the Court found it necessary for the party injured to prove that the dog was known to the owner to be in the habit of killing sheep; but they were very much divided. And the practice of, at least, some of the Sheriff Courts, subjects the owner for a first offence. The Sheriff Courts also frequently fine the owner, and sometimes even for a first offence, kill the dog, or take other precautionary measures against a repetition of the mischief. Perhaps Justices of the Peace are competent to do the same, from the general superintendence of the police and good order of the country with which they are vested. But such proceedings are, usually at least, carried on before the Sheriff.

(*b*) 1 Geo. I. c. 5, sect. 6. 9.

(*d*) 52 Geo. III. c. 130.

(*f*) 57 Geo. III. c. 19.

(*c*) 41 Geo. III. c. 24.

(*e*) 56 Geo. III. c. 125.

The party aggrieved is to recover compensation by summary action against the town-clerk of the city or burgh within which the loss was sustained, or the clerk of supply of the county or stewartry, if the place be not within a city or burgh; and the action is to be brought before the justices of the peace acting under the small debt act, if the sum claimed do not exceed five pounds sterling; and before the judge ordinary if it exceed that sum (*a*). After obtaining decree, the pursuer is to lodge an extract of it with the clerk of supply of the county, or the town-clerk, who are respectively to intimate to the convener or the chief magistrate, and they are respectively to assemble the commissioners of supply, or the magistrates, who are to impose an assessment upon the occupiers of houses and lands, as detailed in the act, such as to pay the sum decerned for (*b*). The collector is to levy a poundage for his trouble; to pay the compensation to the pursuer; and, if the assessment be not paid within six days after demand, to levy it by poinding and sale, by warrant of two justices, or two magistrates, upon the oath of the collector, who is, within ten days after the warrant, to get a sufficiency of effects of the defaulter appraised and sold; and, after paying the assessment, with the expence of poinding and sale, is to account for the overplus to the owner (*c*). Damage to a church or place of worship is to be recovered in the name of the clergyman or minister officiating (*d*). Actions for compensation on account of any damage done as before mentioned must be commenced within one calendar month after the damage is done (*e*).

For the transmission of damages to or against heirs, see *Parties*.

See *Mandate*.

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## DECLINATURE.

THERE are three grounds on which a judge may be declined; that is, his jurisdiction judicially excepted to by the defender.

### I. INCOMPETENCY OF THE JUDGE TO THE ACTION.

There are various crimes, to the *trial* of which justices are

(*a*) 3 Geo. IV. c. 33, sect. 10.

(*b*) Sect. 11.

(*c*) Sect. 12.

(*d*) Sect. 14.

(*e*) Sect. 15.

incompetent. There are some civil questions, too, to which they are incompetent; and, except in one or two cases, it is only under the small debt act that they are at all competent to civil questions. Under each article of this summary, the extent of the competency of the justices to judge of it is mentioned. (See *Justices of the Peace*). The proceedings of an incompetent judge are null.

## II. PRIVILEGE OF THE DEFENDER.

As to criminal cases, British Peers, English Peers, and Scots and Irish Peers, though not of the number of the representatives of the Scots or Irish peerage in the House of Lords, and though, from minority or otherwise, incapable of being representatives, can be tried for high treason, petty treason, and misprision of treason, also for murder, or any other *felony*, only by their peers; towards which trial a bill must, in terms of 6th Anne, c. 23, be found by a grand jury of twelve men before a special commission; but for all offences of a lower degree, all peers are answerable in the ordinary courts of justice; and they are said to be liable also to attachment for such contempts as are of a high degree (*a*). Members of the House of Commons, as such, enjoy no privilege as to arrest for treason, felony, or breach of the peace; and it is considered as very questionable whether this last description of offence does not in this matter comprehend all criminal deeds (*b*).

As to civil cases; members of Parliament are free from all civil suits during the sitting of Parliament; and they are not held to renounce this privilege, unless they do so expressly. Members of the College of Justice may, in the ordinary case, decline the jurisdiction of inferior courts in civil causes; but they are held to waive this objection, unless they specially plead it (*c*). The small debt act, however, contains a clause debarring all privilege under it, on the ground of the party being a member of any other court of justice. (See *Small Debt Act*.)

## III. INTEREST OF THE JUDGE OR HIS KINSMAN.

No judge can decide in his own cause, or in that of his father, brother, or son, mother, sister, or daughter, either by blood or by marriage; or in that of his uncle or nephew, aunt, or niece, by blood. The objection is not removed by the judge being equally related to both parties. In the case of relation

(*a*) Hume, ii. 46, 47.—Articles of Union with Ireland, 39 and 40 Geo. III. c. 67.

(*b*) Hume, ii. 47.

(*c*) Ersk. l. 2. 24.

by marriage, it is not removed by the dissolution of the marriage (*a*).

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### DEFORCEMENT.

DEFORCEMENT is the hindrance or resistance of an officer of the law in the execution of his duty.

The officer must be a lawful officer, and must be engaged in the execution of an official act ; or at least must have assumed his official character towards doing an official act. He must notify that he is an officer ; and must, for that purpose, display his blazon or badge (baton in the case of a constable) if he be not personally known by the party to be an officer ; and he must notify that he is acting officially. He must shew his diligence, if required, but need not part with it to any one, nor give it out of his hands ; nor need he shew it if he have been allowed to begin. Nor are any of those things necessary, if it appear that the opposers all along knew the officer's character and errand. The officer must proceed in a lawful manner. But, though he should be acting unlawfully, the party must do nothing more than is absolutely necessary in order to stop him : wantonly to abuse him is punishable ; and to kill him may be murder. The obstruction must relate to the officer's duty. It must be by actual violence ; by raising some real impediment, or well-grounded alarm of personal violence. The officer must be hindered : if he persist and accomplish his object, the opposition is not deforcement, but only an attempt to deforce, or an assault. This crime relates to all official executions. All persons concerned in the opposition are guilty, though they be not the parties against whom the officer is proceeding, and have not been incited by them (*b*).

The punishment is arbitrary ; imprisonment, and escheat of moveables, out of which the private party is to be indemnified. Sometimes the supreme court decern for a fine, or damages, or both, in lieu of all other penalties (*c*). Justices of the peace would probably, in the ordinary case, for the deforcement of one of their constables, order a short imprisonment, or a fine, and damages.

(*a*) Ersk. i. 2. 25. 26.—Goldie against Hamilton, 16th February 1816.

(*b*) Hume, i. 380–391.

(*c*) Ibid. 391–393.



The competent court for the prosecution, in case of the de-  
forcement of any of the King's officers, is either the Court of  
Session or that of Justiciary. Every inferior court has right  
to vindicate its own authority, and to protect its servants from  
injury in their office (*a*).

The competent prosecutors before justices of the peace seem  
to be, the procurator-fiscal, the constable deforced, or the pri-  
vate party employer (*b*).

The employer cannot be a witness, even in a prosecution by  
the procurator-fiscal, unless he discharge his interest in the  
escheat, and for recovery of his debt. If the private party  
or the officer prosecute, no near relation of either seems ad-  
missible, though subscribing as a witness to the execution of  
deforcement (*c*).

See *Poinding*.

## DISTRESS.

DISTRESS is a term of English law. In that law there are  
eight different kinds of distress, the principal of which is dis-  
tress by a landlord for payment of rent, analogous to the  
hypothec and sequestration of the law of Scotland; but the  
only kind which concerns justices of the peace in Scotland is  
that under their warrant to levy penalties, or other sums, by  
authority of special acts of Parliament.

This distress is of the nature of an execution at common  
law, by which the goods of a debtor are seized, and, after a  
certain time, sold for payment of a debt or penalty.

As some acts authorizing justices to levy sums by distress  
make no provision with regard to the interval between distress  
and sale, or with regard to the expence, it is provided, that in  
all cases where a justice is empowered, by any act of Parlia-  
ment, to issue a warrant of distress for levying any penalty or  
sum in such act, he may, in the warrant, order the goods to  
be sold within a time limited in the warrant, not more than  
eight days, nor less than four days after distress, unless the  
penalty or sum, with the reasonable charges of taking and  
keeping the distress, be sooner paid (*d*); that the officer

(*a*) Hume, i. 393.

(*b*) Vide Ibid. (*c*) Ibid. 394. (*d*) 27 Geo. II. c. 20, sect. 1.

making distress shall deduct the reasonable charges of taking, keeping, and selling, out of the money arising by the sale; that the overplus, after paying those charges and the sum for which distress was used, shall be returned on demand to the owner; and that the officer executing the warrant shall, if required, shew it to the person whose goods are distrained, and allow a copy of it to be taken (*a*).

The justices seem to have no power given them to ascertain the charges of distress of sale; therefore it appears that the officer executing the warrant is the sole judge of it in the first instance; and that, afterwards, if the owner of the goods distrained be dissatisfied, the reasonableness of the charges must be determined by an ordinary action at law (*b*). But by special statutes this power of ascertaining the charges is often given to the justices (*c*).

Where money is, by warrant of a justice, directed to be levied by distress, if sufficient distress cannot be found within his jurisdiction, on oath of this by one witness before a justice of any other place (which oath is to be indorsed by him on the warrant) so much as has not been levied is to be levied by the person to whom the warrant was originally directed, by distress in such other place; and if sufficient distress be not found, the offender is to be proceeded against according to law; and no justice so indorsing a warrant is answerable for any irregularity committed in obtaining it (*d*).

Where a distress is made under the warrant of a justice of the peace, and such distress is insufficient to answer the penalty, a second distress may be taken (*e*).

Goods taken in distress cannot be used by the officer in whose possession they are. Horses cannot be ridden, &c. but cows may be milked, as that is for their preservation (*f*).

In cases of distress for levying a penalty, there seems to be no power to break open doors or gates if locked up or shut, unless the penalty, or part of it, be given to the King (*g*).

With regard to the things which may be distrained, it is a general rule that all personal goods or chattels are liable to be distrained, unless particularly exempted or protected (*h*). But, 1. Such things wherein no man can have an absolute and valuable property, as dogs, cats, rabbits, and all animals *feræ naturæ*, cannot be distrained, unless they be reclaimed from their wild state, and kept for trade or profit. 2. Things sent

(*a*) 27 Geo. II. c. 20, sect. 2.

(*b*) Burn, Distress.

(*c*) Ibid.

(*d*) 33 Geo. III. c. 55, sect. 3.

(*e*) 1 Burrows, 589.

(*f*) R. K. Hutcheson's Excise Inf. p. 137.

(*g*) Burn, Distress.

(*h*) 3 Black. Com. 7.—Williams's J. P. 1000 Distress.

to public places of trade, as a horse in a smithy, or the goods of a guest at an inn, cannot be distrained for sums due by the person in whose premises they are (a). 3. Whatever is part of the freehold cannot to be distrained; *e. g.* doors, windows, furnaces, cauldrons, and the like, fixed to the freehold (b).

The tools and instruments of a man's trade, and the beasts of his plough, and his sheep, cannot be distrained for rent, &c. but they may be distrained where distress is given in the nature of an execution upon a particular statute (*c*).

By many special statutes, *e. g.* those with regard to the conversion of the statute labour in certain places, turnpikes, &c. particular directions are given with regard to the using of distress under them; which ought to be consulted when they are to be acted upon.

A pouding has been found illegal on the decrees of justices under the excise statutes ordering distress (*d*).

## FORMS FOR DISTRESS.

### 1. *Warrant for Distress.*

[Place and date.]—"The justices having considered this complaint" [state the parties, &c.] "Find the complaint proven" [in whole, or in part, as the case may be]. "Therefore, fine and amerciate the said C D, defender, in the sum of \_\_\_\_\_ pounds sterling; and grant warrant to constables to levy from the said C D the said sum, with the expences of the procedure herein authorised, by distress and sale of his readiest goods (rendering to him the overplus, if any be) to be applied as directed by the acts of Parliament libelled on; the said sale to take place on the \_\_\_\_\_ day after distress."

"G H, J. P."  
"J K, J. P."

**2. Note to be given to the Party.**

“ Note of goods, the property of C D” [design him] “ levied  
 “ by distress by me E F, constable, in presence of N O and P Q”  
 [design them] “ witnesses, upon the                      day of                      ,  
 “ years, in virtue of a warrant of the justices of the peace for  
 “ the county of                      , dated the                      day of                      ,

(a) Co. Lit. 47.—Salk. 249.—Burr, 1502.—3 Black. Com. 8.—Williams, *ibid.* (b) 1 Inst. 47.—Williams, *ibid.* (c) 3 Salk. 138.—Williams, *ibid.* (d) Lord Advocate against Forgan, 20th February 1811.

“ years, upon the complaint of A B” [design him] “ against  
 “ the said C D, viz.” [insert the goods] “ which goods, if not  
 “ relieved by the said C D, within                      days of the date  
 “ hereof, by payment of the sum of                      of fine con-  
 “ tained in said warrant, and of the expences of taking and  
 “ keeping such distress, will be roused and sold for payment  
 “ thereof in terms of said warrant, and the overplus, if any be,  
 “ returned to the said C D ; which note I now deliver to the  
 “ said C D” [or “ to the servant of the said C D, within his  
 “ dwelling-house at                      ,” or as the case may be].  
 “ This I do in presence of said witnesses.”  
 “ E F, Constable.”

### 3. *Execution of Distress.*

“ Upon the                      day of                      ,                      years, I, E F, con-  
 “ stable, by virtue of a warrant by the justices of the peace of  
 “ the shire of                      dated the                      day of                      ,  
 “ in a complaint at the instance of A B” [design him] “ against  
 “ C D” [design him] “ to levy by distress and sale from the said  
 “ C D the sum of                      pounds sterling of fine contained in  
 “ said warrant, passed with the witnesses after named, and ask-  
 “ ed of the said C D payment of the said sum, which he re-  
 “ fused” [or “ neglected to make”]. “ Therefore, I did, then  
 “ and there, after public proclamation, distrain” [mention the  
 “ goods seized] “ belonging to the said C D, in payment” [or  
 “ as part payment” as the case may be] “ of the said sum,  
 “ and of the expence of making and keeping the said distress,  
 “ and I did carry off the same ; and I delivered to the said  
 “ C D” [or “ to his servant, within his dwelling-house,” &c.  
 “ or as the case may be] “ a note signed by me of what I had  
 “ done ; which mentioned, that if he did not relieve those  
 “ goods within                      days of the date thereof, by payment of  
 “ the above sum, and of the reasonable expence of taking and  
 “ keeping the said distress, the same would be sold for pay-  
 “ ment ; and which note contained the date hereof, the date  
 “ of said warrant, and the names and designations of the wit-  
 “ nesses who were present thereat. These things were so done  
 “ in presence of N O and P Q” [design them.]  
 “ N O, Witness.                      E F, Constable.”  
 “ P Q, Witness.

## DISTRICTS.

EXTENSIVE counties are usually, for the more speedy, frequent, and convenient administration of justice, divided into districts; sometimes to the number of 15 or 20. In each of those districts sessions are held, chiefly for the business arising within the district. The jurisdiction of each justice, however, remains entire over the whole county. Thus, for example, the sentence of a district meeting imposing a fine, may be executed against persons who reside in a different district of the county (*a*); and the justices of one district may hold their court and act in another.

Each district ought to have a separate clerk and procurator-fiscal. It is inconvenient in large counties not to have such public officers at other places besides the head burgh to look after the public interest. The clerk is named by the clerk of the peace for the county. In case of the absence both of the principal and of a deputy appointed by him, at a district meeting, the justices at the meeting are in use to appoint a clerk to attend them. The procurator-fiscal is named in the same way by the procurator-fiscal of the county; and if the procurator-fiscal, or a deputy appointed by him, do not attend, a procurator-fiscal is appointed by the justices for the occasion.

The *Small debt act* authorizes a special division of counties for the purposes of that act.

See *Sessions of the Peace*.

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 DRUNKENNESS.

JUSTICES of the peace are directed “to put the acts of Parliament in execution for the punishing of all persons found guilty of the sin of drunkenness or excessive drinking, especially under the names of healths, or haunting taverns or alehouses after 10 of the clock at night, or at any time of the day except in time of travel, or for ordinary refreshments; as also against the keepers of the taverns or ale-

(*a*) Fullarton against Hamilton, 19th Nov. 1714. Dalrymple, No. 115.

“houses that shall sell the drink unto them” (*a*). The fines are the same as for swearing; to be disposed of in the same manner; and there is the same provision as in swearing, that justices may apply corporal punishments authorized by law (*b*). (See *Profanity*, sect. Profane Swearing). Any person may prosecute (*c*).

It is believed that no prosecution for this vice has for a long time been thought of. But it often occasions breaches of the peace requiring punishment.

See *Alehouses*.—*Spirituous Liquors*.—*Crimes*, sect. Intoxication.

## DUEL.

From the general principles which regulate cases of *homicide*, as explained under that head, where persons meet by deliberate appointment and fight a duel, fairly and on equal terms, if one of them be killed, the other is guilty of murder; and this seems to hold even though the parties fight in heat of blood, and on a sudden quarrel, if they go out by agreement with that design. Where one of the parties, after coming upon the ground, endeavours to adjust their quarrel, and declines to fight, and is at last compelled to kill the other in order to save his own life, he is guilty of culpable homicide (*d*). See *Homicide*.

Where there is a tendency towards a duel, and more especially where a challenge has been given, justices of the peace ought to endeavour to prevent it, by laying the parties under surety of the peace for sufficiently large sums.

See *Surety of the Peace*.—*Threats* (*e*).

(*a*) 1661, c. 32.—1672, c. 22.

(*b*) 1661, c. 32.—1661, c. 32.—1672, c. 22.—1693, c. 40.—1696, c. 31.

(*c*) 1696, c. 31.

(*d*) *House*, i. 235.

(*e*) By 1694, c. 12, it was made capital to fight a duel, though no person was killed; and by 1696, c. 31, it was made punishable with imprisonment and exclusion of moveables to be concerned in giving, sending, or accepting a challenge, though no fighting ensued. But these statutes were repealed by 39 Geo. III. c. 79.

## EXCISE AND CUSTOMS (*a*).

**Excise**, according to its original principle, was an inland imposition, paid sometimes upon the consumption of the commodity, frequently upon the retail trade. It has been extended to a variety of foreign articles imported.

**Customs** (which are more ancient than excise) are duties paid to the public, by authority of Parliament, upon the importation or exportation of goods, wares, or merchandize.

The law with regard to excise and customs was, by the articles of union, appointed to be the same in Scotland as in England (*b*).

All that is here proposed is to mention those provisions with regard to excise and customs, falling within the province of justices of the peace, which are of a more general nature. For the details of the duties, &c. the last consolidation act for each branch for the time, and the subsequent alterations upon it, must be consulted; for which purpose, compilations such as Mr Huie's are valuable guides. Justices ought not in general to judge on any information for an offence against the revenue, founded upon special statutes, without having those statutes before them; otherwise they cannot be certain that they are acting according to law. No abridgement (however accurate it may be supposed) ought to be absolutely relied on. The acts are furnished by Government to the revenue officers; who produce them when they bring informations.

Proceedings under the laws of the excise are much more frequent before justices of the peace than proceedings under the laws of the customs.

### I. EXCISE.

#### 1. *Forcible offences, for trial of which, before higher courts, justices may prepare.*

Some of those offences are punishable capitally; some only arbitrarily.

(*a*) Those who may wish more full information on proceedings before justices for forfeitures and penalties under the laws of excise and customs than the limits of this work admit, are referred to Boscawen on Convictions—R. K. Hutchison on Excise and *qui tam* informations.—Howard on Summary Proceedings under the laws of Excise and Customs, which treats the subject in considerable detail.—Paley on Summary Convictions on Penal Statutes before Justices of the Peace.—Williams's Justice of the Peace, *vers* Excise.—Dickenson's Justice of the Peace, *vers* Excise.

(*b*) Articles 6, 7, 8, 18.

The following are capital crimes.—If three or more persons, armed with fire-arms or other offensive weapons, be assembled within Great Britain or any port, harbour, or creek thereof, or within the Isle of Man, or any port, &c. there, in order to assist in the illegal running or carrying away goods liable to excise duties not paid or secured, or from any warehouse wherein such goods are deposited, under any act for securing excise duties, or in rescuing or taking away such goods after seizure, or in rescuing any person apprehended for any offence made felony by any act relating to the excise, or in preventing the apprehending of any person guilty of such offence; or if three or more persons, so armed, be so assisting within Great Britain or other limits before mentioned; or if any person maliciously shoot at any vessel of the navy, customs, or excise, within any port, harbour, or creek, of Great Britain, or of the Isle of Man, or in any port of the British or Irish channels, or on the high seas within 100 leagues of the coast of Great Britain or Ireland, or if any person, within the limits last mentioned, maliciously shoot at, maim, or dangerously wound, any officer of the army, navy, marines, militia, or volunteers, or other public military or naval forces, or of the customs or excise, or any person aiding such, under any act relating to the excise. Such offences, if committed in any port, &c. of Guernsey, Jersey, Alderney, Sark, or Man, may be tried in those islands respectively; if committed elsewhere out of the united kingdom, may be tried in any county of the united kingdom; and if committed in England, Scotland, or Ireland, may be tried in that part of the united kingdom in which they were committed, and in any county of such part (*a*). If any person be charged on oath before any justice, or other person competent, with so assembling or assisting, or so maliciously shooting, maiming, or wounding, where such officer, or any person assisting him, is killed, such justice, &c. is forthwith to certify the same to one of the principal secretaries of state, upon which the King in council may direct an order to be published in the London Gazette, for the person guilty to surrender himself, within a period not less than 60 days, to any justice of peace, or other person competent, specified in such order, and may require the order to be proclaimed by the sheriff of the county; and if he surrender, the person to whom he surrenders is to commit him to prison, to be dealt with according to law; but if he do not surrender within the time limited in the order, or if, between surrender and trial, he escape, he is to suffer death and confis-

(*a*) 52 Geo. III. c. 143, sect. 11. This act was repealed in so far as it regards the *Customs* by 6 Geo. IV. c. 105.



cation, if the offence was committed in Scotland, or any port, harbour, or creek thereof, or within a hundred leagues of the coast ; execution to be awarded by the Court of Justiciary, or Circuit Courts (*a*).

Offences made felony without benefit of clergy (capital for the first offence) by former acts with regard to the excise, are now only felony with clergy, unless otherwise directed by this act (*b*).

It is punishable with transportation for seven years, if persons to the number of five or more be tumultuously assembled, in order forcibly to oppose the execution of the powers respecting spirituous liquors, conferred by the Act 24 Geo. II. c. 40 ; or in order to rescue any offender against any act relative to spirituous liquors, or for licensing retailers thereof ; or in order to assault or beat any person who has informed or borne evidence against, or has brought to justice, any person so offending. (*c*)

See the corresponding section under the division " Customs."

Independently of special enactments, it is an offence highly punishable at common law to assault the officers of the revenue in the discharge of their duty (*d*).

Justices of the peace, and other magistrates, may, of course, apprehend and commit at common law, for any of the offences which have been mentioned, whether punishable capitally or arbitrarily. (See *Arrest, &c.*)

It may be mentioned here that, though officers and their party, in making a seizure, or otherwise, fall into a mistake in the execution of their duty, they are not liable to be abused at will ; but that, unless they have used personal violence, those maltreating them may be punished at common law (*e*).

## 2. *Recovering penalties of excise before justices.*

The leading regulation, with regard to the recovery of penalties of excise is contained in two acts of Charles II. which have been made general by subsequent acts. On some parts of that regulation modifications have been made by subsequent statutes ; on other parts some remarks are necessary. The general regulation shall first be stated, with the acts extending it, inserting letters of reference for the modifications and remarks ; and then those modifications and remarks, in the order in which they arise, with the letters of reference prefixed.

(1.) *General regulation.*—All forfeitures and offences made

(*a*) 52 Geo. III. c. 143, sect. 12.

(*c*) 24 Geo. II. c. 40, sect. 28.

(*e*) Hume, i. 484.

(*b*) 52 Geo. III. c. 143, sect. 1.

(*d*) Hume, i. 487.

and committed within the limits of the head office of excise in London, shall be heard and determined by the commissioners and governors of excise, and commissioners of appeals, in case of appeals; and beyond those limits (which of course the whole of Scotland is), by any two justices of the peace residing near to the place where such forfeitures shall be made, and offences committed (A); and, in case of neglect of such justices for 14 days after complaint, and notice thereof given to the offender, the sub-commissioners of excise for the place shall hear and determine the same; and if the party find himself aggrieved by the judgment of the said sub-commissioners, he may appeal to the next quarter sessions of the justices of peace there, who may hear and determine the matter, and whose judgment shall be final (B). Which commissioners of appeals, chief commissioners of excise, justices of the peace, and sub-commissioners, are required, upon complaint or information of any such forfeiture made, or offence committed (C), to summon the party accused (D), and, upon his appearance or contempt, to proceed to the examination of the fact (E); and, on proof made thereof, either by the voluntary confession of the party (F), or by the oath of one credible witness (G), to give judgment (H); and to issue warrants under their hands, for levying such forfeitures upon the goods and chattels of the offender (I); and to cause sale to be made, if they shall not be redeemed within 14 days (K); and for want of sufficient distress, to imprison the party till satisfaction (L). And no writ of *certiorari* shall supersede execution, or other proceedings, upon any order made by the justices, &c. in pursuance of these acts (M) (a).

By 49 Geo. III. c. 81, sect. 9, it is enacted, that all fines, penalties, and forfeitures, imposed by that or any other act then in force, or thereafter to be made, relating to the duties of excise, shall be sued for, levied, recovered, or mitigated, by such ways, means, and methods, as any fine, penalty, or forfeiture, is or may be recovered or mitigated, by any law or laws of excise (if not otherwise specially directed by that or any other such act of Parliament) or by an action of debt, bill, plaint, or information, in any court of record at Westminster, or in the Court of Exchequer in Scotland; one moiety of which fine, penalty, or forfeiture, shall be to the King, and the other to him who shall discover, inform, or sue for the same. This clause is inserted in the excise acts in general.

The excise acts also contain a general clause to this effect.

(a) 12 Car. II. c. 23, sect. 31, 36.—c. 24, sect. 45. 50.

All the powers, authorities, directions, rules, methods, penalties, and forfeitures, clauses, matters, and things, which, by 12th Car. II. or any other law relating to the excise duties, are provided, settled, or established, other than in such cases for which other penalties or provisions are prescribed by this act, shall be used in managing, collecting, mitigating, ascertaining, recovering, and paying the duties.

(2.) *Modifications and remarks.*—(A) No commissioner, farmer, or sub-commissioner of excise, or common brewer of ale or beer for sale, or any innkeeper, can act as a justice of the peace in questions with regard to excise (a). There are prohibitions, in the acts imposing excise duties on various commodities, against the dealers, or those concerned in such commodities, acting as justices in questions with regard to duties on the articles with which they are concerned. For instance no common brewer of ale or beer, innkeeper, or distiller, or any person interested in those trades, can grant any licence, or act as a justice of peace in matters which in any way concern the laws with regard to distillers, or the duty upon spirituous liquors, or the retailers of them (b).

All informations, &c. for any penalty, forfeiture, or punishment, under the laws of excise, ought to be tried in the county in which the duties were charged, or the cause of forfeiture, &c. arose (c). But if the parties remove out of the jurisdiction in which the duties were charged, or offences committed, the commissioners of excise, or justices of the peace within whose jurisdiction any person charged by an act concerning the duties of excise, or duties under the management of the commissioners of excise, or who has committed any offence against any of these acts, is found, may judge and issue process as if the offence had been committed within their jurisdiction; and if, upon a warrant of distress issued by them, a return be made, that no sufficient distress can be found, the commissioners and justices respectively, within whose jurisdiction the party is at any time found, upon production to them of such warrant and return, may commit the offender to the next county jail till satisfaction be made (d).

“Residing near” does not limit prosecutions to the *nearest* justices (e).

The act only vests jurisdiction in justices with regard to

(a) 15 Car. II. c. 11, sect. 8.

(b) 24 Geo. II. c. 40, sect. 22.

(c) 15 Car. II. c. 11, sect. 22.

(d) 18 Geo. II. c. 26, sect. 13.—5 Geo. III. c. 43, sect. 26.

(e) Shaw's Justice, 8th edit. p. 321-2, &c.

their local jurisdiction ; it does not give them power to judge beyond their territory (*a*).

(B) This act gives no appeal to the quarter sessions from the judgment of the justices ; and, in ordinary cases, no such appeal lies (*b*). But there are exceptions introduced by special provision, in certain cases. Thus, appeal is made competent from the judgment of the justices in questions with regard to the following articles :—Hides, skins, parchment, and vellum (*c*) ; malt, upon giving six days notice in writing ; but if there be not six days between the order of the justices and the quarter sessions, the appeal may be to the second quarter sessions ; and the quarter sessions may award costs to either party, to be levied by distress, by warrant of the justices, or any two of them (*d*) : candles, soap, starch (*e*) : plate licences (*f*) : prosecutions with regard to the distilleries in the Highlands of Scotland, which are specially laid upon 25th Geo. III. c. 22 (*g*). But the statutes for any particular article must be consulted. The quarter sessions are, on appeal from particular justices, with regard to the duties on malt, hides and skins, vellum and parchment, to amend defects in the form of the procedure which may have occurred before the particular justices (*h*).

No appeal in any cause of excise is to be admitted until the appellant have deposited the single duty in the hands of the commissioners, farmers, or sub-commissioners of the district, and given security to the commissioners of appeal, or justices of the peace, where such cause is to be finally adjudged, for such penalty as was adjudged against him ; and if, upon hearing such appeal, the original judgment be reversed, the commissioners, &c. are to restore as much as is adjudged to the appellant, and the party originally prosecuting is to pay double costs ; but, in case the first judgment be affirmed, the party appealing is to pay the like costs to the commissioners, &c. complained of (*i*). And no appeal is to be admitted (beyond the limits of the head-office in London) unless brought within four months after the first judgment, and notice given of it, or left at the dwelling-house of the party (*j*).

On appealing, both parties ought to produce all the witnesses

(*a*) Talbot against Hubble ; 2 Strange, 1154.

(*b*) Collector of Excise of Aberdeen against Mollison, 7th March 1798.

(*c*) 9 Anne, c. 1, sect. 36.—1 Geo. II. c. 16, sect. 4.

(*d*) 12 Anne, Sess. 1, c. 2, sect. 37—3.—1 Geo. II. Sess. 2, c. 16, sect. 3.

(*e*) 23 Geo. III. c. 21, sect. 37.

(*f*) 31 Geo. II. c. 32, sect. 11.

(*g*) 25 Geo. II. c. 22, sect. 17.

(*h*) 6 Geo. I. c. 21, sect. 10.—1 Geo. II. Sess. 2, c. 16, sect. 3.

(*i*) 15 Car. II. c. 11, sect. 19.

(*j*) 15 Car. II. c. 11, sect. 26.

examined before the justices who pronounced the judgment appealed from, and they must be examined of new, as their evidence was not recorded. It is understood that, in practice, no other witnesses are examined, upon hearing appeals, than those examined before the original justices. This is established by statute, in the case of appeals as to malt duty (*a*).

(C) No suit is to be raised for the recovery of any penalty or forfeiture under any act relating to the customs or excise (except in the case of persons detained and carried before two justices in pursuance of the act 6 Geo. IV. c. 108, with regard to the customs) otherwise than in name of the Attorney-General (Lord Advocate in Scotland) or under the direction of the Commissioners of Excise, or in name of some officer of the customs or excise, under the direction of the commissioners respectively (*b*). And the Attorney-General (Lord Advocate) may stop proceedings in such cases (*c*).

No information can be brought against any common brewer, alehouse-keeper, distiller, vinegar-maker, or cyder-maker, for any false or mis-entry, or other offence, unless it be entered before the persons appointed to determine it, within three months (which are lunar, of 28 days each) (*d*) after the offence; and notice is to be given to the person against whom the information is laid, in writing, or left at his dwelling-place, within one week after laying the information (*e*). The two acts cited regard particular articles; but, by the general clause in other excise acts, referring to 12 Car. II. or *any other law* relating to the excise duties, this direction is considered to be virtually incorporated in such acts (*f*). A longer period is however specially allowed in certain cases; and it has been thought that this limitation does not in general apply to prosecutions for seizures and other specific forfeitures, unless specially provided in the acts regarding them (*g*).

The offence must be distinctly stated in the information, that the party may know what he has to defend, and that it may appear that the justices have jurisdiction. But it has not been

(*a*) 48 Geo. III. c. 74, sect. 15.

(*b*) 6 Geo. IV. c. 108, sect. 100.—See the King against Stevenson; Easter Term.—42 Geo. III.—2 East's Rep. p. 362. (*c*) Sect. 101.

(*d*) Williams' J. P. 2d edit. vol. ii. p. 284.—R. K. Hutcheson on Excise Informations.—Howard on Excise and Customs, p. 46.

(*e*) 1 William and Mary, Sess. 1, c. 24, sect. 16.—12 and 13 William III. c. 11, sect. 17.

(*f*) Williams' J. P. 2d edit. vol. ii. p. 285.—R. K. Hutcheson's Exc. Inf. p. 28.—Howard on Excise and Customs, p. 45.—Hutcheson's J. P. 3d edit. iii. 355.

(*g*) See Howard on Excise and Customs, 1812, p. 44, 45.

the custom in Scotland to be so punctilious in drawing excise informations as is usual in England.

(D) Where the Commissioners of Excise, or Justices of the Peace, have issued any summons for the appearance of persons offending against, or for forfeitures incurred by, the laws of excise, or other laws for collecting and securing the duties under the management of the Commissioners of Excise, which has been left at the house, or usual place of residence, or with the wife, child, or menial servant of such persons, this is an effectual summons (*a*). And, in all cases relating to the excise, or to any duties under the management of the Commissioners of Excise (except where special provision is made to the contrary) the leaving such summons at the house, work-house, ware-house, shop, cellar, vault, or usual place of residence of such person, directed to such person, by his right or his assumed name, is effectual (*b*).

(E) It will be observed that, upon the accused failing to appear, he is not to be held as confessed; regular examination of the fact by proof must be made, as if he had been present.

(F) No authority is given to refer to the defender's *oath*. That is a mode of proof unknown to the common law of England.

(G) The Commissioners of Excise, or Justices of the Peace, upon any information for any offence against the laws of excise, may summon any person (other than the accused) to appear before them, and to give evidence; and, in case of neglect to appear, or if such person refuse to give evidence, he is to forfeit L.10, to be recovered by the laws of excise (*c*).

It has been decided in England that the "informer" is the person who *informs the court*, that is, the person in whose name the *information is filed* (*d*). Excise informations being exhibited in the name of the collectors or supervisors, they of course are, in point of law, the *informers*; so that the *seizing officer*, or *officer* discovering the fraud prosecuted for, or indeed any person other than he in whose name the information is exhibited, is a competent witness on the hearing before the justices.

Either party, prosecutor or defender, or those acting for him, may of course cross-question the witnesses for the opposite party, and object to their credibility or competency. If the defender appear, the evidence must be taken in his presence; or

(*a*) 32 Geo. II. c. 17, sect. 1.      (*b*) 32 Geo. II. c. 17, sect. 2.

(*c*) 7 and 8 Will. III. c. 30, sect. 24.

(*d*) Sanders against Bevan in the Court of Exchequer in England, 7th February 1786.

in that of those acting for him, on his obtaining leave to attend by others (*a*).

In those cases in which a regular discussion or debate takes place (which, however, are few) the proceeding before justices of the peace in Scotland is not according to the order followed in England or in the Court of Exchequer, although the jurisdiction in excise matters is of English origin, but in practice (and it appears to be properly so) is according to the order followed in Scots courts, viz. the charge read—the nature of the defence stated—the evidence for the plaintiff led—the evidence for the defendant led—any observations for the plaintiff to be made—any observations for the defendant to be made. See *Process*, sect. Criminal.

(H) It may be mentioned that, in giving judgment, a conviction may take place, although the offence should be proved to have been committed on a different day from that charged, or although the precise day should not be ascertained, if it appear to have been committed within a reasonable distance before or after the day charged (*b*). This is analogous to the common law of Scotland. (See *Process*.)

The general rule with regard to the distribution of penalties (to which however there are a few exceptions) is, that (after deducting costs) one half of fines, penalties, and forfeitures goes to the king, the other to him who discovers, informs, or sues (*c*). It is held in England, that, if the statute give the penalty in certain proportions, the conviction need not declare the distribution of it (*d*); and it is understood never to be done in practice; but that, where the statute requires the justices to distribute the penalty among certain persons according to their discretion, an adjudication that it be disposed of according to law is bad; and that they ought to declare the proportions (*e*).

Many of the revenue penal laws expressly authorize the justices to give costs. A general act provides, that where any complaint is made before any justice or justices, out of sessions, and a warrant or summons issues in consequence thereof, the justice or justices who have determined the matter may award such costs to be paid by either party to the other, and in such a manner as he or they may think fit; and that, if the person so ordered do not immediately pay those costs, or give security for them to the satisfaction of the justice, they shall be levied by distress; and that, for want of distress, the justice shall

(*a*) R. K. Hutcheson's *Exc. Inf.* 71-3.

(*b*) Bunbury's *Rep.* 223-4, 262.

(*c*) 24 Geo. II, c. 40, sect. 29.

(*d*) Salkeld, 383.—Boscawen on Convictions, 122.

(*e*) 2 Term. *Rep.* 96.—R. K. Hutcheson's *Exc. Inf.* 115.

commit the person to the house of correction for the place where such person resides, to be kept to hard labour, not exceeding one month, nor less than ten days, or until such sum, with the expences attending the commitment, be paid (*a*). It also provides that, upon the conviction of any person upon a penal statute, where the penalty amounts to or exceeds L.5, the costs shall be deducted by the justice, according to his discretion, out of the penalty, so that the deduction shall not exceed one-fifth part of the penalty (*b*). It also provides, that the justices in sessions may, from time to time, lay down or alter such rules and regulations concerning costs or charges, to be allowed to any person by virtue of this act, as they shall see just; which rules and regulations having received the approbation and signature of one or more of the Judges of Assize (Justiciary, in Scotland) shall be binding (*c*). Perhaps this general act, though it seems limited to England in ordinary cases, extends to Scotland in revenue cases; the English law having in general become ours in such cases. But it is understood not to be applied in practice in Scotland. And it seems not to be in general advisable in Scotland to apply it.

With regard to the mitigation of the penalty, the justices &c. may mitigate the forfeiture, penalty, or fine, so as not to make it less than double the value of the duty of excise which ought to have been paid, besides the reasonable costs and charges of such officers or others as were employed therein, to be allowed to them by the said justices (*d*). In the act for enforcing the laws against clandestine importation of soap, candles, and starch, it is provided that the commissioners and justices may mitigate the penalties, &c. as they think fit; but so that they be not reduced to less than a fourth part, and the reasonable expences of the officer in discovering and prosecuting (*e*), half to the King, half to the seizer or prosecutor (*f*). In the act with regard to hides, &c. the penalties may be mitigated, so as not be reduced to less than one fourth, besides costs (*g*). Sometimes a fixed sum is appointed as the *minimum*. For example, the penalty of L.100 for persons not licenced distillers, brewers, or vinegar-makers, having in their possession wash, fermenting or fermented, exceeding 20 gallons, or any quantity of low wines, cannot be modified under

(*a*) 18 Geo. III. c. 19, sect. 1.

(*b*) 18 Geo. III. c. 19, sect. 2.

(*c*) 18 Geo. III. c. 19, sect. 9.

(*d*) 12 Car. II. c. 23, sect. 32; c. 24, sect. 46.—22 and 23 Car. II. c. 5, sect. 8.

(*e*) 23 Geo. II. c. 21, sect. 38.

(*f*) Sect. 39.

(*g*) 9 Anne, c. 11, sect. 37.



**L.90 (a):** In each case, the special act on the subject should be consulted. When the justices intend to mitigate, they ought in their conviction, first, to state that the defender has incurred the whole of the penalty, specifying the amount, and then to express the mitigation (*b*). The power of mitigation ought to be used with prudence, otherwise the offender may be a gainer on the whole transaction. For example, if a person have evaded the duty on 50 barrels with success, and be at last discovered with three or four barrels, he is a gainer, if the penalty on these three or four barrels be reduced to double the duty on them (*c*). In mitigating a penalty, where the costs are directed to be taken into account in the mitigation, it is not necessary that the conviction specify how much is for the offence, and how much for the costs; but the justices in proportioning the mitigation may consider what is proper for the offence, and what for the charges; and in making their mitigation, may adjudge the payment of one gross sum sufficient for both (*d*). And it is not customary, in Scotland at least, to make such a separation in the judgment in such cases. In those cases where costs are allowed to be imposed, in addition to a penalty, and independently of mitigation, they ought to be distinctly ascertained in the judgment (*e*).

It is laid down in England that justices ought in all cases to return convictions of penalties to the quarter-sessions, whether an appeal lie or not; and the reason assigned is, that the Crown may not be deprived of its share of forfeiture (*f*). But it is not customary, at least in Scotland, to return convictions to the quarter-sessions, except when an appeal to them is taken by the party aggrieved.

With regard to the form of the judgment, and the different particulars proper to be contained in it, the justices in this country are in the established use of framing the judgment and whole proceedings in excise prosecutions in a summary manner. Accordingly, it has been found sufficient that the record of the sentence of the justices in an excise case was intelligible, by reference to the previous proceedings, though not so distinct and explicit as it might have been, the proceedings themselves

(a) 48 Geo. III. c. 10, sect. 3.

(b) Howard on Excise and Customs, p. 186.

(c) R. K. Hutcheson's Ex. Inf. 128.

(d) Howard on Excise and Customs, p. 189.—Williams' Justice of the Peace, 2d edit. ii. 286.—Dickinson's Justice of the Peace, i. 488.

(e) Howard on Excise and Customs, p. 209.—Paley on Summary Convictions, p. 164, 173.

(f) R. K. Hutcheson's Ex. Inf. p. 122.—Howard on Excise and Customs, p. 41.—Paley on Summary Convictions, p. 195.

having been correct (*a*). But still it is proper to be distinct as well as short.

(I) All goods and commodities, in respect of which any duty of excise is imposed, and all materials, preparations, utensils, and vessels in the custody of the maker or manufacturer of such goods, or of any person in trust for him, are liable to all the duties in arrear from such maker or manufacturer, for such or the like goods; and are subject to all penalties incurred by him, or any other person using any warehouse or other place belonging to him, for any offence against any act relating to the duties on such goods; and it is lawful in such cases to levy such duties and penalties, and to use such proceedings as may be lawfully done in relation to such goods, in case the persons offending were the true owners (*b*). The warrant ought therefore to direct to seize all utensils used by the defendant (*c*).

The justices have no power, under the excise laws, to levy by arrestment and furthcoming debts due to the defender (*d*).

A *poinding* is illegal, under the excise laws, where the statute directs the money to be levied by *distress* (*e*). (See *Distress*).

(K) It appears that the interval between distress and sale may be shortened in the ordinary case, as noticed under *distress*. In offences against the act with regard to candles, soap, and starch (*f*), and against that with regard to plate licences (*g*), the interval is perhaps still 14 days.

(L) As the warrant of imprisonment must be grounded on the first warrant to distrain, such warrant must be returned, stating either that all the money was not levied on it, or that no distress could be found, as the case may be; and upon this return warrant to imprison may be issued (*h*).

Writers differ as to what is proper to be done where a part of the penalty has been recovered on the chattels, but not the whole. Dr Burn makes this distinction, that where, by the act, there is a limited time of imprisonment, for instance, three months, the defendant shall not pay part, and then be imprisoned the whole three months, as this would be to punish him both ways; but that, where the imprisonment is till satis-

(*a*) Broadford against Nicholson, 14th November 1807.

(*b*) 28 Geo. III. c. 37, sect. 21.

(*c*) R. K. Hutcheson's Ex. Inf. 138.

(*d*) Caldwell against Macdowall, 26th July 1747.—Kilk. p. 310.

(*e*) Lord Advocate against Forgans, 20th February 1811, in Court of Justiciary, Fac. Coll.

(*f*) 23 Geo. II. c. 21, sect. 37.

(*g*) 31 Geo. II. c. 32, sect. 11.

(*h*) Williams' J. P. ii. 228.—R. K. Hutcheson's Ex. Inf. 144.

faction of the penalty, the payment of the penalty is the chief thing to be regarded, and the imprisonment is not intended as a punishment, but as a mean to compel payment, and that, if part is paid already, the enlargement may come the sooner, by payment of the residue; so that the defendant may be detained till payment of the whole (*a*).

If any person against whom a warrant of commitment in execution, commonly called a body warrant, is issued by any three commissioners of excise in England, or by any justice or justices of the peace in Great Britain, escape into any place, out of their jurisdiction, three of said commissioners in England, or any justice or justices of the peace of the jurisdiction of such place, upon proof on oath of the hand-writing of the granter of the warrant, may indorse his or their name on it, which is sufficient authority to the bringer of the warrant, or to those to whom it was originally directed, to execute it in the jurisdiction of such place, and to carry the offender before the commissioners or justice or justices indorsers, or some other justice or justices of the place where the warrant was indorsed, who are, by indorsement upon such warrant, to commit the offender to the common jail, or house of correction, of the county or place where such warrant is executed, according to the exigency of such warrant, there to remain till delivered by due course of law (*b*). And any prosecution is to be brought against the granters of such warrant, but not against the indorsers (*c*).

In some cases, the offender may be imprisoned without waiting for distress. For example, the justices are enjoined, if the penalty for unlicensed persons having wash above 20 gallons, or any quantity of low wines, in their possession, be not forthwith paid upon conviction, immediately to grant warrant to imprison them for three to six months, unless sooner paid (*d*).

(M) From those expressions, joined with the whole tenor of the excise acts, it is held that the sentences of the justices are final, so that they cannot be reviewed by the supreme court, if the proceedings have been regular, and the justices have not

(*a*) Burn, Excise.

(*b*) 32 Geo. III. c. 10, sect. 1.

(*c*) Sect. 2.—For the necessary subsistence of poor persons confined under process for the recovery of duties or penalties under any act relative to the Customs or Excise, by order of the Commissioners, those Commissioners may make an allowance not more than sevenpence halfpenny, and not less than fourpence halfpenny per day, to such person, out of the duties of Customs or Excise in their hands, as the case may require.—6 Geo. IV. c. 108, sect. 72.

(*d*) 48 Geo. III. c. 10, sect. 3.

exceeded their powers, unless such review have been made competent in the particular case (*a*). For review by the quarter sessions, see (*B*).

### *3. Seizures of forfeited goods, &c, under the laws of Excise.*

(1.) *Making of seizure*.—The statute 42 Geo. III. c. 93, provides, that if goods liable to any duty of excise, imposed by any act in force before passing that statute, be hid in order to evade such duty, they are forfeited, with the packages, and may be seized by any officer of excise; and that when such goods are suspected to be so concealed, the officer (beyond the limits of the head office in London) may make oath of his suspicion before a justice of the jurisdiction where the goods are suspected to be concealed, setting forth his grounds of suspicion; upon which the justice, if it seem proper, grants warrant to the officer, by day or by night, but if at night, in presence of a constable or peace officer, to enter, search for, and seize all such goods which he shall find forfeited, with the packages containing them; that every constable, or peace officer, must attend when required; and that persons obstructing incur a penalty of L.100 (*b*). Subsequent excise acts (particularly the consolidation act, 43 Geo. III. c. 69) usually have a general clause, that the duties, &c. contained in them shall be subject to all the same rules, regulations, provisions, &c. to which the duties existing at passing the act were subject.

Sometimes the statutes upon particular articles make special provisions with regard to searching. Thus, in the act 3 Geo. IV. c. 52, with regard to the distillation of spirits, it is provided that, if any officer of excise know or suspect of any private still, &c. or any spirits, or materials for distillation, being in any house or place not licensed, and make oath before a justice of the peace for the place, setting forth the grounds of his suspicion, the justice may grant warrant to the officer, by day or by night, to enter, search, and seize, and to detain the articles seized, where found, or to remove them to the nearest office of excise: and if not claimed within ten days they are to

(*a*) Paterson against Ramsay and others, 25th January 1710, Forbes.—It has been found that a judgment of the justices under 39 Geo. III. c. 66, with regard to damaging raw hides, which declares that the justices shall finally hear and determine, and that their judgment shall not be removed into any other court by *certiorari*, may be advocated to the Court of Session. Guthrie against Cowan, 10th December 1807. See that case and the authorities cited in it.

(*b*) 42 Geo. III. c. 93. sect. 17.

be forfeited, and the proprietor of such still, &c. or the person in whose possession it is found, is to forfeit for every place and for every still, &c. L.200; and any person obstructing the officer is to forfeit L.200 (*a*). But this does not make it unlawful for officers of excise to search for and discover private stills, &c. and materials for distillation, without such warrant, under the same penalties and forfeitures (*b*).

The same statute as to distillation farther provides, that, if any person be found aiding and assisting in any private distillery, he forfeits L.30, and may be carried by the officer of excise before a justice of the peace, who, on confession, or the oath of one or more credible witnesses, is to convict in the penalty, which is to be immediately paid to the officer, otherwise the offender is to be committed to gaol for six calendar months, unless the penalty be sooner paid. The penalty for a second offence is L.60, and, in default of immediate payment, commitment for a year unless the penalty be sooner paid (*c*).

The same statute as to distillation farther provides, that no spirits are to be removed without a permit, on pain of forfeiture with the vessels, &c. and twenty shillings per gallon (*d*): and that any officer of excise may stop any person removing or carrying spirits and examine the permits, and if the person refuse to produce the permits, or have not permits, he forfeits L.100, and may be conveyed by the officer with the spirits before a justice of the peace residing near the place; and the justice is forthwith to hear and determine the information, and on confession, or the oath of one or more credible witnesses, is to convict in the penalty, which is not to be mitigated below one-fourth; and if the penalty be not immediately paid into the hands of the officer, the justice is to commit the offender to any gaol or prison of the county for six calendar months, unless the penalty be sooner paid (*e*).

It seems proper when a justice of the peace is required to act in any such cases as those which have been referred to, that he should require the officer to produce the statute on which he is desired to act, and that he should consider it before acting upon it.

(2.) *Condemnation of seizure.*—If any spirits be seized as forfeited by any act relating to the excise, such seizure may be determined in a summary way, before any two justices of

(*a*) 3 Geo. IV. c. 52, sect. 113.

(*b*) 3 Geo. IV. c. 52, sect. 114.

(*d*) 3 Geo. IV. c. 52, sect. 92.

(*c*) 3 Geo. IV. c. 52, sect. 116.

(*e*) 3 Geo. IV. c. 52, sect. 93.

goods after seizure, or in rescuing any person apprehended for any offence, made felony by this or any other act relating to the customs, or in the preventing the apprehension of any person guilty of such offence; or in case three or more persons so armed, be so aiding or assisting, they are guilty of a capital felony (*a*).

If any person be concerned in maliciously shooting at any vessel or boat belonging to the navy, or in the service of the revenue, in any part of the British or Irish channels, or within a hundred leagues of the coast of the united kingdom, or be concerned in maliciously shooting at, maiming or dangerously wounding any officer of the army, navy, or marines, duly authorised, and on full pay, or any officer of customs or excise, or any person assisting him or duly employed for the prevention of smuggling, he is guilty of a capital felony (*b*).

If any person, being in company with more than four other persons, be found with any goods liable to forfeiture under this or any other act relating to the customs or excise, in company with one other person within five miles of any navigable river, carrying offensive arms or weapons, or disguised in any way, he is to be transported as a felon for seven years; and if he return into the united kingdom before the expiration of the seven years, he is to be punished capitally as a felon (*c*).

If any person by force or violence, assault, resist, oppose, molest, hinder, or obstruct any officer of the army, navy, or marines, duly authorised, and on full pay, or any officer of customs or excise, or any person assisting him or duly employed for the prevention of smuggling, he is to be adjudged a felon, and is to be transported for seven years, or to be imprisoned in any house of correction or common gaol, and kept to hard labour for any term not exceeding three years, at the discretion of the court (*d*).

Any offence committed upon the high seas against this or any other act relating to the customs, or any penalty or forfeiture incurred upon the high seas for any breach of such act, is, for the purpose of prosecution, to be deemed to have been committed, and such penalties and forfeitures to have been incurred, at the place on land into which the person is taken; and if such place on land is within a city, borough, liberty, division, franchise or town corporate, any justice of the peace for such place, as well as any justice for the county within which it is situated, has jurisdiction to hear and determine: and all of-

(*a*) 6 Geo. IV. c. 108, sect. 56.

(*c*) 6 Geo. IV. c. 108, sect. 58.

(*b*) 6 Geo. IV. c. 108, sect. 57.

(*d*) 6 Geo. IV. c. 108, sect. 59.

fences against this or any other act relating to the customs, committed in any city, borough, &c. are to be deemed to have been committed within the county, and any justices of the peace for either may hear and determine (*a*).

Any indictment or information for any offence against this, or any other act relating to the customs, may be tried in any county, in the same manner as if the offence had been committed in that county (*b*).

For some general remarks applicable to this division of the subject, see the conclusion of the corresponding division with regard to *Excise*.

See also sect. Making of Seizure, where certain offences of a forcible nature, more immediately connected with seizure, are noticed.

## 2. *Recovering penalties of customs before Justices.*

All penalties and forfeitures incurred by this, or any other act relative to the customs, may in Scotland be sued for in the Court of Exchequer, in the name of the Attorney General (Lord Advocate) or of some officer of the customs, or by information before any two or more justices of the peace (*c*). But no justice of the peace who is a collector or comptroller, or otherwise connected with the collection of the customs or excise, is to take cognizance of any matter relating to the summary conviction of persons offending against this act (*d*).

It has been already noticed, in treating of forcible offences against the customs, that offences committed at sea are to be held, for the purposes of prosecution, to have been committed in the place on land into which the offender is brought, and that offences may be tried in any county; and reference is here made to that passage.

No indictment is to be preferred, or suit commenced for any penalty or forfeiture, under this or any other act relative to the customs or excise (except in the case of persons detained and carried before two or more justices in pursuance of this act) unless in name of the Attorney General (Lord Advocate), or under the direction of the commissioners of customs or excise, or in name of some officer of customs or excise, under the direction of the commissioners (*e*). And the Attorney General (Lord Advocate) may stop all such proceedings by entering a *noli prosequi*.

All suits or informations (*i. e.* for penalties or forfeitures)

(*a*) 6 Geo. IV. c. 108, sect. 74.

(*c*) 6 Geo. IV. c. 108, sect. 73.

(*e*) 6 Geo. IV. c. 108, sect. 100.

(*b*) 6 Geo. IV. c. 108, sect. 78.

(*d*) 6 Geo. IV. c. 108, sect. 103.

for any offence against this, or any other act relative to the customs, must be brought within three years after the offence if before the Court of Exchequer, and within six months after the offence if before justices of the peace (*a*).

Where any information is exhibited before two or more justices of the peace, for the recovery of any penalty under this or any other act relative to the customs (except as is otherwise provided for in subsequent sections of this act) the justices are to summon the party accused, and, upon his appearance or default, to proceed to the examination of the matter; and upon due proof, either by voluntary confession or by the oath of one or more credible witnesses, are to convict the offender in the penalty; and in case of non-payment, they are to cause it, by warrant of distress, to be levied from the goods of the offender; or if it appear to the justices, by confession or otherwise, that he has not sufficient goods, they may commit the offender to any gaol in the county where the offence has arisen, or where the offender is found, to remain till the penalty shall be paid; but the gaoler is to discharge him at the end of six calendar months from the date of the warrant of commitment, and the offender is then wholly discharged from payment of the penalty (*b*). The justices upon conviction (except as provided in subsequent sections of this act) may mitigate the payment of the penalty, but not to less than one fourth (*c*). The commissioners of the treasury and the commissioners of the customs may mitigate or remit any penalty or fine incurred under any law relating to the customs (*d*).

In any information or proceedings had under this act, or any other act relative to the customs, the averment that the commissioners of customs or excise have directed such information or proceedings, or that any vessel is foreign or British, or that any person is or is not a subject of his Majesty, or is or is not a seaman or sea-faring man, or fit to serve in the Royal Navy, or that any person is an officer of the customs, is sufficient without proof, unless the defendant shall prove the contrary (*e*).

If upon any trial a question arise whether any person is an officer of the army, navy, or marines, duly authorized and on full pay, or an officer of customs or excise, evidence of his having acted as such is sufficient, without producing his com-

(*a*) 6 Geo. IV. c. 108, sect. 77.

(*b*) 6 Geo. IV. c. 108, sect. 75.—*Note.* The alimient of poor persons so committed has been noticed in a Note to the corresponding passage relative to commitments for penalties of excise.

(*c*) 6 Geo. IV. c. 108, sect. 76.

(*d*) 6 Geo. IV. c. 108, sect. 44.

(*e*) 6 Geo. IV. c. 108, sect. 104.



mission or deputation, unless sufficient proof shall be given to the contrary ; and every such officer, and any person assisting him, is a competent witness upon the trial of any suit or information, on account of any seizure or penalty, notwithstanding such officer or other person may be entitled to the whole or any part of, such seizure or penalty (*a*).

See certain general remarks applicable to this section in the corresponding section of the division "Excise."

### 3. *Seizure of Forfeited Goods, &c. under the Laws of the Customs.*

(1.) *Making of seizure, &c.*—All goods, and all ships, vessels, and boats, which, by any act at any time in force relative to the customs, shall be declared to be forfeited, are to be seized by any officer of the customs (*b*) ; and such forfeiture of ships, &c. includes the guns, tackle, apparel, and furniture ; and such forfeiture of goods includes the packages ; and all goods, the importation of which is restricted on account either of the packages or of the place from which they are brought or otherwise, are to be deemed prohibited goods ; and if imported into the united kingdom, otherwise than to be legally deposited or warehoused for exportation, are to be forfeited (*c*). Vessels and boats and goods liable to forfeiture under any act relating to the customs, may be seized upon land or water by any officer of the army, navy, or marines, duly authorized and on full pay, or officers of customs or excise, or any person having authority from the commissioners of customs or excise to seize ; and all vessels, boats, and goods, so seized, must, as soon as conveniently may be, be delivered into the care of the proper officer appointed to receive them (*d*).

Any officer of the army, navy, or marines, duly authorized and on full pay, or any officer of customs, producing (if required) his warrant or deputation, may go on board any vessel within the limits of any port of this kingdom, and may search all parts of the vessel for prohibited or uncustomed goods ; and may remain on board during the whole time that the vessel remains within the limits of the port, and may search any person either on board or who may have landed from any vessel, provided such officer have good reason to suppose that such person has prohibited or uncustomed goods secreted about his person ; and any person obstructing any such officer in going or remaining on board, or in entering or searching any

(*a*) 6 Geo. IV. c. 108, sect. 105.

(*b*) 6 Geo. IV. c. 106, sect. 30.—6 Geo. IV. c. 107, sect. 128.

(*c*) 6 Geo. IV. c. 107, sect. 128. (*d*) 6 Geo. IV. c. 108, sect. 34.

vessel or person, forfeits L.100 (*a*). Before any person is so searched he may require the officer to take him before any justice of the peace, or before the collector, comptroller, or other superior officer of the customs, who is to determine whether there is reasonable ground to suppose that such person has prohibited or uncustomed goods about his person; and if so, such justice, &c. is to direct such person to be searched in such manner as he shall think fit; but if not, the justice, &c. is to discharge such person; and every such officer must, upon demand, take such person before a justice, &c. detaining him in the meantime; and females are only to be searched by females duly authorized for that purpose by the commissioners of the customs (*b*). If any such officer do not take such person with reasonable dispatch before a justice, &c. when required, or if he require any person to be searched by him without having reasonable ground to suppose that such person has prohibited or uncustomed goods about his person, he forfeits L.10.

The powers of this act do not extend to officers of the navy, army, or marines, unless on full pay and duly employed for the prevention of smuggling (*c*).

Any officer of the customs, or person acting under the direction of the commissioners of the customs, authorized by writ of assistance from exchequer, may take a constable, headborough, or other public officer inhabiting near the place, and, in the day time, enter into any house, shop, cellar, warehouse, room or other place; and, in case of resistance, break open doors, chests, &c. to seize uncustomed and prohibited goods, and secure them in the custom house warehouse of the nearest port; and, for the purposes of this act, any such constable, &c. duly sworn as such, may act without the limits of the place for which he has been sworn (*d*). Writs of assistance are in force for six months after the conclusion of the reign in which they have been issued (*e*).

If any goods liable to forfeiture by this, or any other act relating to the customs, be stopped or taken by any police officer, or other person acting by virtue of any act of parliament, or otherwise duly authorized, they are to be taken to the nearest custom house warehouse, and to be delivered to the proper officer within 48 hours after being stopped or taken (*f*).

If any vessel or boat liable to seizure or examination, under any act for the prevention of smuggling, do not bring to, on being required or chased by any vessel of the navy, having the

(*a*) 6 Geo. IV. c. 108, sect. 36.

(*c*) 6 Geo. IV. c. 108, sect. 106.

(*e*) 6 Geo. IV. c. 108, sect. 12.

(*b*) 6 Geo. IV. c. 108, sect. 37.

(*d*) 6 Geo. IV. c. 108, sect. 11.

(*f*) 6 Geo. IV. c. 108, sect. 42.

proper pendant and ensign hoisted, or by any vessel employed for the prevention of smuggling by the admiralty, or by the commissioners of the customs, having a proper pendant and ensign hoisted, as shall be appointed by orders in council or by royal proclamation, the person having the command (first firing a gun as a signal) may fire into such vessel or boat: and if any person be wounded or killed in consequence, and if the person having the command, or any other person assisting him, be brought before any magistrate on that account, he is to be admitted to bail (a).

Persons are not to hoist any pendant, ensign, or colours on board any ship, vessel, or boat, in imitation of those used in the royal navy, or any other ensign or colours than those prescribed by royal proclamation, under a penalty of L.50, to be recovered with costs, in Scotland, in the courts of session or exchequer, or before any two justices of the peace; and any officer of the navy, customs, or excise may enter such vessel, &c. and seize such prohibited pendant, ensign, or colours, which are to be forfeited to his majesty's use (b).

Any of the subjects of this country, who are found or discovered to have been on board any vessel or boat liable to forfeiture under this or any other act relating to the customs for being found within certain limits from the coast (as detailed in the act) having, or having had on board or attached such goods as subject the vessel or boat to forfeiture, or who are found or discovered to have been on board any vessel or boat from which any part of the cargo has been thrown overboard during chase, or staved or destroyed, forfeits L.100; and any person not a subject of this country found or discovered to have been on board any vessel or boat liable to forfeiture for any of those causes, within one league of the coast of the united kingdom, or the Isle of Man, or within any bay, harbour, river, or creek, of that island, forfeits L.100; and any officer of the army, navy, or marines, duly authorised and on full pay, or any officer of customs or excise, or any person assisting them, or duly employed for the prevention of smuggling, is to carry such person, in Scotland, before two justices of the peace, to be dealt with as subsequently directed in this act (as afterwards noticed); but, if such person prove to the satisfaction of the justices that he was only a passenger, and had no interest in the vessel or cargo, he is forthwith to be discharged (c).

(a) 6 Geo. IV. c. 108, sect. 14.

(b) 6 Geo. IV. c. 108 sect. 15.

(c) 6 Geo. IV. c. 108, sect. 49.

Any person who unships, or is concerned in unshipping, any spirits or tobacco, liable to forfeiture under this or any other act relating to the customs or excise, or who carries or conceals, or is concerned in carrying or concealing any such spirits or tobacco, forfeits L.100; and may be detained by any officer of the army, navy, or marines, duly authorised and on full pay, or any officer of customs or excise, or other person assisting them, or duly employed for the prevention of smuggling, and taken before two justices of the peace, to be dealt with as after directed (*a*).

If persons liable to be arrested and detained under any act relating to the customs be not detained at the time of the offence, or if they escape, any officer of the army, navy, or marines, duly authorised and on full pay, or any officer of customs or excise, or his assistants, may arrest and detain them, and carry them before two justices of the peace, to be dealt with as if detained at the time of committing the offence (*b*).

Any two justices before whom any person is carried, for having been on board any vessel or boat liable to forfeiture under any act relating to the customs, or being concerned in unshipping, carrying, conveying, or concealing any spirits or tobacco liable to forfeiture under any such act, on confession or proof by one or more credible witnesses, are to convict and to impose a penalty of L.100, without mitigation, and are to commit to gaol till payment. And if the person convicted be a seafaring man, and fit for the naval service, and do not prove that he is not a subject of this country, the justices, in lieu of such penalty, are to send him on board a ship of the navy, to serve in the navy for five years; and if he escape in the meantime, he is to be detained by any person, and delivered over in the same manner to complete his service of five years. And the justices may detain the person convicted in gaol, not exceeding one month, until they can arrange for conveying him on board a ship of the navy. The Commissioners of the Treasury may mitigate (*c*).

If on examination of a person convicted, and sent on board a ship of the navy, he be found unfit, he is to be again carried before two justices, who are to award the penalty of L.100, and to imprison till payment. Persons sent on board ship are not to be sent away from the united kingdom till one month after conviction (*d*).

(*a*) 6 Geo. IV. c. 108, sect. 50.

(*b*) 6 Geo. IV. c. 108, sect. 51.

(*d*) 6 Geo. IV. c. 108, sect. 81.

(*c*) 6 Geo. IV. c. 108, sect. 80.

In order to afford time for preparing informations, convictions, and warrants of commitment, where any person is detained and taken before two justices for any offence against any act relating to the customs, if they think that there is reasonable cause for detention, they may detain him for a reasonable time, as well before as after the information has been exhibited; and after the expiration of such time, they may proceed finally to hear and determine the matter (*a*).

If any person, after sun-set or before sun-rise, between 21st September and 1st April, or after the hour of eight in the evening, and before six in the morning at other times, be concerned, or present, for the purpose, in making any signal by light, smoke, fire-works, flags, fire-arms, or any other contrivance or device, from any vessel or boat, or from any part of the coast of the united kingdom, or within six miles of it, for making any signal to any person on board any smuggling vessel, he is guilty of a misdemeanour, and may be arrested by any person and carried before any two justices of the peace residing near the place of the offence, who, if they see cause, are to commit the offender to the next county gaol, until the next court of oyer or terminer, great session, or gaol delivery, or until delivered by due course of law: and the court before whom the offender is convicted may either impose a penalty of L.100, or, at their discretion, may commit the offender to the common gaol or house of correction, to be kept to hard labour for any time not exceeding one year (*b*). If any person be charged with, or indicted for, such an offence, proof of a signal not being intended lies upon him (*c*). Any person whatsoever may put out, extinguish, or prevent such light, smoke, fire-works, noise, or other device or contrivance; and may go upon any lands for that purpose (*d*).

If any person hinder, oppose, molest, or obstruct any officer of the army, navy, or marines, being duly authorised, and on full pay, or any officer of customs or excise, in the execution of his duty, or in the due seizing of any goods liable to forfeiture by this or any other act relating to the customs, or any person assisting him, or duly employed for the prevention of smuggling, or be concerned in rescuing any goods seized, or attempt or endeavour to do so, or before, at, or after any seizure, stave, break, or otherwise destroy any goods, to prevent their being seized or secured, he forfeits L.200 (*e*).

(2.) *Condemnation of seizures under laws relating to the*

(*a*) 6 Geo. IV. c. 108, sect. 83.

(*b*) 6 Geo. IV. c. 108, sect. 52.

(*d*) 6 Geo. IV. c. 108, sect. 54.

(*c*) 6 Geo. IV. c. 108, sect. 53.

(*e*) 6 Geo. IV. c. 108, sect. 55.

*customs.*—It has already been noticed in treating of the recovery of penalties of customs, how forfeitures may be sued for ; what justices may not act ; what is provided with regard to the place where offences committed at sea, or in any other county, may be tried ; who may prosecute ; and within what time the suit or information may be brought.

Where any information is exhibited before two or more justices of the peace, for the forfeiture of any goods seized under any act relating to the customs, or for the prevention of smuggling, and where the party to whom the goods belonged, or from whom they were seized, is known, the justices are to summon that party ; and upon his appearance or default, they are to proceed to the examination of the fact ; and upon due proof that the goods are liable to forfeiture, under any act relating to the customs, are to condemn them. And, if the party from whom the goods have been seized is not known, the justices are to cause public notice to be stuck at the market cross, if the seizure is made in Edinburgh ; and if the seizure is made at any other place in Scotland, a notice is to be publicly read by the public crier at the next market place, stating that the goods have been seized, and that the hearing relative to them is to take place on a certain day, not being less than eight days from the date of the notice ; and in default of any person's attendance in consequence of the notice, the justices are to proceed in the hearing and condemnation of the goods (*a*).

It has been already noticed, in treating of the recovery of penalties for offences against the customs, that averments with regard to the authority for bringing the information, and certain other things, are sufficient without proof ; and that officers, &c. are not disqualified as witnesses by being entitled to the whole or a part of the seizure or penalty.

When goods are seized for non-payment of duties or any other cause, and when any dispute arises whether the customs, excise, or inland duties, have been paid, or whether they have been lawfully imported, or concerning the place from which they have been brought, the proof lies on the owner or claimer of the goods, and not on the officer who seizes them (*b*).

The Commissioners of the Treasury, or the Commissioners of the Customs, may direct any vessel, boat, goods, or commodities, seized under any act relative to the customs, to be delivered to the proprietor, whether condemnation have taken

(*a*) 6 Geo. IV. c. 108, sect. 79.

(*b*) 6 Geo. IV. c. 108, sect. 102.

place or not, upon such terms and conditions as they may deem expedient (*a*).

Vessels and goods condemned for breach of any law relative to the customs, are to be disposed of. Goods admissible to duty, to be sold by auction to the best bidder, for not less than the duty upon importation; and if they do not bring that, to be put up to sale for exportation; and if not sold, to be destroyed. Prohibited goods to be put up for sale for exportation to the best bidder, and, if not sold, to be destroyed. Vessels calculated for fair trade to be sold to the best bidder. Vessels calculated for smuggling to be broken up, and the materials to be sold to the best bidder. If the commissioners of the customs think any of the vessels necessary for the public service, they may cause them to be used for that purpose (*b*).

#### 4. *Complaints against Officers of the Customs, &c.*

If any information or suit be brought on account of any seizure under any act relating to the customs, and the judge certify that there was probable cause for seizure, the plaintiff is not to have more than twopence of damages, and the defendant is not to be fined above one shilling (*c*). No process is to be sued against any officer, &c. in relation to the customs, until one calendar month after notice given to him (*d*). No evidence is to be adduced except what is contained in the notice (*e*). The officer, &c. may tender amends (*f*). The officer, &c. neglecting to tender amends may pay money into court (*g*). Action is to be commenced within six months after the cause of action has arisen (*h*.)

For some general observations with regard to the jurisdiction of justices in the case of offences by officers, see the corresponding section in the division of this article, which relates to "Excise."

Informations before justices of the peace for offences against this or any other act relating to the customs, and convictions for such offences, and warrants of justices founded on such convictions, are directed to be drawn "in the form, or to the effect," in a schedule annexed to this act (*i*). Those forms are annexed to this article. And printed copies of them, with blanks, &c. for use in practice, are in the hands of the officers

(*a*) 6 Geo. IV. c. 108, sect. 44.

(*c*) 6 Geo. IV. c. 108, sect. 92.

(*e*) 6 Geo. IV. c. 108, sect. 94.

(*g*) 6 Geo. IV. c. 108, sect. 96.

(*i*) 6 Geo. IV. c. 108, sect. 82.

(*b*) 6 Geo. IV. c. 108, sect. 62.

(*d*) 6 Geo. IV. c. 108, sect. 93.

(*f*) 6 Geo. IV. c. 108, sect. 95.

(*h*) 6 Geo. IV. c. 108, sect. 97.

of customs, and are usually presented by them to justices of the peace when called upon to act.

### III. FORMS OF PROCEEDINGS, &c. IN OFFENCES AGAINST EXCISE.

[As long and formal precedents could not be overtaken in the multiplicity of cases which occur, and still less separate proceedings for each case, it is customary, in most places, to use concise forms, and to comprise many cases (for example, 20 or 30) in one information. A regular record of conviction can be drawn up in formal technical language at any time subsequent to the hearing; and no regular record need ever be drawn up, unless it be required to sustain the conviction against an appeal, or in defence to an action for levying the penalty, or the like. See *King against Barker*, Hil. Term. 1800, 1. East's Rep. 186.]

[In most places, the officer of excise furnishes printed forms of informations, warrants, and other proceedings.]

[The information, the scheme or schedule, containing columns for the names of the defendants, the place and date of the offences, goods forfeited, and penalties incurred, and a marginal column for a memorandum of statutes, and a deliverance for citation, are usually printed on a face of a sheet. A copy of the information against each party, with a citation by the officer, are printed on a face of a second sheet, and the execution of citation by the officer on the other face of the second sheet; duplicates of the information and citation being made, one of which is delivered to the party, and the other is returned to the justices at the hearing, with the execution filled up. The judgment, with a scheme or schedule, consisting of columns for the name of each defendant, whether he appeared or not, whether the offence was confessed, proved, or not proved, whether the defendant was convicted, acquitted, or respited, goods forfeited, penalties incurred, and the sum to which each penalty is reduced by mitigation, is printed on the second face of the first sheet, on which the information was printed. A warrant to seize the defendant's goods, with the necessary returns, is printed on the first and second pages of a third sheet. And a warrant to arrest the person of the defendant, commonly called a "body warrant," is printed on the first and second pages of a fourth sheet].



“ County of } “ Be it remembered, that on this  
“ } “ day of in the  
“ year of the reign of our Sovereign Lord King George the  
“ Fourth, at in the county of ,  
“ , being one of his Majesty’s of excise, as  
“ well for his said Majesty as for himself, exhibiteth to and  
“ before us and  
“ being of his Majesty’s justices of the peace for  
“ the said residing near to the respective places  
“ where the several offences mentioned in the *fourth* column  
“ of the hereunder scheme or schedule were respectively com-  
“ mitted, and forfeitures of the goods and chattels mentioned  
“ in the *fifth* column of the said scheme or schedule made and  
“ incurred, complaints and informations; which said com-  
“ plaints and informations are commenced and prosecuted by  
“ order of the commissioners of excise; and thereby informeth  
“ us, that within three months now last past, the several and  
“ respective persons named in the *first* column of the said  
“ scheme or schedule, at the several places respectively men-  
“ tioned in the *second* column of the said scheme or schedule,  
“ at the several times respectively mentioned in the *third*  
“ column of the said scheme or schedule, have severally and  
“ respectively been guilty of the offences in that behalf re-  
“ spectively mentioned in the said *fourth* column, against the  
“ laws and statutes of excise; which several offences, with the  
“ several forfeitures of goods and chattels thereby incurred,  
“ are set forth opposite to or against the names of the said  
“ several persons who have committed the said several offences  
“ respectively mentioned in the said *fourth* column; and the  
“ penalties incurred by the said offences respectively are set  
“ forth in the *sixth* column of the said scheme or schedule,  
“ opposite to the respective offences: And thereupon the said  
“ informant, as well for his said Majesty as for himself, prays  
“ the consideration of us, the said justices, in the premises;  
“ and that the said several and respective persons may be  
“ convicted of their said several offences, may forfeit and pay the  
“ said several penalties in that behalf mentioned in the said *sixth*  
“ column, and that the goods and chattels respectively men-  
“ tioned in the said *fifth* column may, for the reasons in that  
“ behalf in the said *fourth* column mentioned, remain for-  
“ feited.”

**"G H, J. P."**

## 2. Deliverance for citation.

**"G H, J. P."**

**3. Citation to be served on the defender.**

“ I, \_\_\_\_\_ officer of excise, charge you,  
 “ \_\_\_\_\_ designed in the above written in-  
 “ formation and deliverance, to appear personally to answer  
 “ the same before his Majesty’s justices of the peace at  
 “ \_\_\_\_\_ upon the \_\_\_\_\_ day of \_\_\_\_\_ at  
 “ \_\_\_\_\_ o’clock \_\_\_\_\_ noon; and if you neglect to ap-  
 “ pear on the day and at the place before mentioned, the  
 “ justices will proceed to hear and determine the matter of  
 “ the said information, as if you were personally present.  
 “ This I do upon the \_\_\_\_\_ day of \_\_\_\_\_ before  
 “ these witnesses.” [Name and design the witnesses.]

**4. Execution of citation to be returned by the officer.**

[This is subjoined to a duplicate of the information, and of the deliverance for citation, which were delivered to, or left for, the defender.]

**"A B, officer of excise."**

**"E F, witness."**

### **5. Conviction.**

“ County of } “ At the time and place appointed by  
 “ } “ our summons, on the complaints and  
 “ informations mentioned on the other side of this paper, that  
 “ is to say, on this day of at  
 “ at the said the several persons named  
 “ in the *first* column of the scheme or schedule on the other  
 “ side of this paper, and also in the *first* column of the here-  
 “ under scheme or schedule do, or do not respectively appear,  
 “ as set forth in the *second* column of the hereunder scheme  
 “ or schedule ; and their said several and respective offences  
 “ mentioned in the *fourth* column of the scheme or schedule  
 “ on the other side of this paper, and also in the *third* column  
 “ of the hereunder scheme or schedule, being respectively con-  
 “ fessed, proved, or not proved, as expressed in the *third* co-  
 “ lumn of the hereunder scheme or schedule ; we, the within-  
 “ named justices do convict, respite, or acquit the said several  
 “ persons of their said several and respective offences, as stated  
 “ in the *fourth* column of the hereunder scheme or schedule :  
 “ It is therefore now here considered and adjudged by us,  
 “ the said justices, that the said several persons so named as  
 “ above-mentioned, (if not acquitted or respited), have for their  
 “ said several offences, respectively forfeited the penalties and

“ sums of money mentioned in the *sixth* column of the here-  
 “ under scheme or schedule; and that the goods and chattels  
 “ mentioned in the *fifth* column of the scheme or schedule on  
 “ the other side of this paper, and also in the *fifth* column of  
 “ the hereunder scheme or schedule are, for the reasons in  
 “ that behalf aforesaid, forfeited; and which said penalties or  
 “ sums of money, if mitigated, we the said justices have now  
 “ here mitigated and lessened to the several and respective  
 “ sums mentioned in the *seventh* column of the hereunder  
 “ scheme or schedule, and hereunder set opposite to or against  
 “ the respective names of the said several persons so named as  
 “ above-mentioned: and we the said justices now here adjudge,  
 “ that the said forfeitures and penalties be distributed as the  
 “ law directs.

“ Given under our hands at \_\_\_\_\_ aforesaid, this  
 “ said \_\_\_\_\_ day of \_\_\_\_\_

[Here follows the scheme or schedule of offences, with the  
 necessary columns.]

“ G H, J. P.  
 “ J K, J. P.”

#### 6. *Warrant to Seize Goods for a Penalty on Judgment.*

“ To \_\_\_\_\_ and \_\_\_\_\_ officers of excise,  
 “ and to either of them, and to such other person and  
 “ persons as they or either of them shall take to their  
 “ assistance.

“ We whose hands are hereunto set, two of his Majesty’s jus-  
 “ tices of the peace in and for the county of \_\_\_\_\_ do,  
 “ in his said Majesty’s name, authorize and command you, and  
 “ every of you, that, upon the goods and chattels of  
 “ \_\_\_\_\_ of \_\_\_\_\_ in the county of \_\_\_\_\_  
 “ you, or any of you, do levy the sum of \_\_\_\_\_ pounds  
 “ \_\_\_\_\_ shillings of lawful money of Great Britain,”  
 [“ by us mitigated and lessened from the sum of  
 “ of like lawful money,” if there was a mitigation] “ recovered  
 “ against him by \_\_\_\_\_ officer of excise, who, by  
 “ order and direction of the commissioners of excise, prosecuted  
 “ as well for our Sovereign Lord the King as for himself, for  
 “ a certain offence committed by the said  
 “ against the laws and statutes of excise; that is to say,” [de-  
 scribe the offence in the words of the information]: “ Where-

"of he the said    is duly convicted before  
"us, and for the levying thereof you are to seize, take, and  
"carry away the goods and chattels aforesaid; and if, in five  
"days next after such seizure, the said sum of  
"pounds    shillings, together with the reasonable  
"charges of taking and keeping the said goods and chattels,  
"shall not be paid, then, and in such case, after the expira-  
"tion of the said five days, you are to make sale thereof, or  
"so much thereof as shall be sufficient to levy the said sum of  
"which, when levied, you are forthwith to  
"pay to    collector of excise, for the collection  
"called    collection, for the time being, to  
"be by him distributed and applied according to the statute  
"in such case made and provided; and if, after levying  
"thereof, together with the reasonable expenses attending  
"the taking, keeping, and sale of the said goods and chattels,  
"any overplus shall remain of the money arising by sale  
"thereof, you are to render such overplus to the said  
"; and all constables of the said county are here-  
"by required to be aiding and assisting to you in the due exe-  
"cution hereof. But in case sufficient distress cannot be  
"found whereon to levy the said sum of  
"pounds    shillings, you are forthwith to certify  
"the same to us the said justices, together with a return of  
"this precept. Given under our hands at    in  
"the said county of    this    day of  
"in the    year of his said Majesty's reign, and in the "  
"year of our Lord one thousand eight hundred and

" G H, J. P.  
" J K, J. P."

**7. Return to be made on Warrant where no Goods can be found.**

“ We officers of excise, do hereby  
 “ certify to and two of his  
 “ Majesty’s justices of the peace in and for the county of  
 “ that, by virtue of the within warrant from  
 “ the said justices to levy the sum of pounds  
 “ shillings, upon the goods and chattels of  
 “ we have made diligent search for such  
 “ goods and chattels, and that we cannot find out or discover  
 “ any goods or chattels, and we do not know or can find that  
 “ the said hath any goods or chattels what-  
 “ soever, whereon the said sum can be levied. Witness our

" hands at	in the county of	this
" day of	one thousand eight hundred	
" and		" A B."
		" C D."

### 8. Return where part of the Penalty is Levied.

“ We officers of excise, do hereby certify  
“ to and two of his Majesty’s  
“ justices of the peace, in and for the county of  
“ that we have levied by distress and sale of the goods and  
“ chattels of the sum of which  
“ said sum we have paid, or have ready to pay to  
“ the collector of collection, as by the within  
“ warrant of the said justices we are commanded ; and we do  
“ further certify to the said justices, that the said  
“ hath not any other goods or chattels whereon we can levy  
“ the residue of the said sum of or any part  
“ thereof. Dated this day of in  
“ the year one thousand eight hundred and  
“ A. B.”  
“ C. D.”

9. *Warrant to arrest the Body of the Defendant upon a return of the First Warrant, that he hath no Goods, &c.*

" To                      and                      officers of excise,  
 " and to either of them, and to such other person and  
 " persons as they, or either of them, shall take to their  
 " assistance, and to the keeper of the tolbooth or jail  
 " at                      in the said county of

"Whereas we whose hands are hereunto set, two of his Majesty's justices of the peace in and for the said county of by our warrant, under our hands, bearing date the day of now last past, did require and command you the said and or either of you, to levy the sum of pounds shillings therein mentioned, upon the goods and chattels of And whereas you the said by a return and certificate under your hand, bearing date the day of have certified to us, that, having made diligent search for such goods and chattels, you cannot find any whereon

" to levy the said sum of                      pounds  
 " shillings, or any part thereof ;" [or, " you have levied, by  
 " distress and sale of the goods and chattels of the said  
 " the sum of                      pounds                      shillings, in part of the  
 " said sum of                      pounds                      shillings, and that  
 " the said                      hath not any other goods or chattels  
 " whereof you could levy the residue of the said sum of  
 "                      pounds                      shillings, or any part thereof,"  
 if part of the penalty has been levied]. " We, the said jus-  
 " tices, do therefore, in his said Majesty's name, hereby  
 " authorise, require, and command you, every, or any of you,  
 " to take and arrest the body of the said                      and  
 " him forthwith to carry to the tolbooth or jail at  
 " in the said county of                      and there to deliver him  
 " into the custody of the jailor or keeper of the said tolbooth  
 " or jail, together with this warrant : And we, the said jus-  
 " tices, do also command you, the said keeper of the said tol-  
 " booth or jail, to receive into, and safely keep in your custody,  
 " in the said tolbooth or jail, the body of the said  
 " for six calendar months, or until he shall satisfy and pay the  
 " sum of                      pounds                      shillings," [or  
 " the sum of                      pounds                      shillings, being  
 " the residue of the said sum of                      pounds  
 " shillings," where any part of the penalty has been levied]  
 " of lawful money of Great Britain," [" by us mitigated and  
 " lessened from the sum of                      pounds  
 " shillings of like lawful money," if there was a mitigation,]  
 " by us, the said justices, adjudged against him upon an in-  
 " formation exhibited against him by                      officer of  
 " excise, as well on behalf of his Majesty as of himself, by  
 " order and direction of the commissioners of excise, for a cer-  
 " tain offence committed by the said                      against the laws  
 " and statutes of excise, that is to say," [describe the offence  
 in the words of the information] " whereof he stands convicted  
 " before us, the said justices ; and all constables and other  
 " peace officers are hereby required to be aiding and assisting  
 " to you in the due execution hereof ; and, for so doing, this  
 " shall be to you, or any of you, a sufficient warrant and  
 " authority. Given under our hands at                      the  
 "                      day of                      in the year of our Lord one  
 " one thousand eight hundred and

G H, J. P."

J K, J. P."

[It is easy to vary the forms where circumstances require it.]

[These are the forms prescribed by the act 6 Geo. IV. c. 108, as mentioned in a preceding part of this article].

- “ County of } “ Be it remembered, that  
 “ to wit. } “ on the day  
 “ of in the year of our Lord one thousand eight  
 “ hundred and , A B, officer of customs, who  
 “ is directed by the commissioners of his Majesty’s customs to  
 “ prefer this information, gives us G H and J K, Esquires,  
 “ two of his Majesty’s justices of the peace, to understand and  
 “ be informed, that C D,” [design him] “ being a subject of  
 “ his Majesty, on the day of , in the year of  
 “ our Lord one thousand eight hundred and ” [here  
 state the offence] “ contrary to the form of the statute in that  
 “ case made and provided, whereby the said C D hath for-  
 “ feited the sum of .” [Sums to be expressed  
 in *words*, not in figures].

**"J K, J. P."**

- “ County of } “ Be it remembered, that  
 “ to wit. } “ on the day  
 “ of in the year of our Lord one thousand eight  
 “ hundred and an information was exhibited by  
 “ A B, officer of customs, before us G H and J K, Esquires,  
 “ two of his Majesty’s justices of the peace, against C D :”  
 [design him] “ which said information charged, that the said  
 “ C D, on the day of in the year of our Lord  
 “ one thousand eight hundred and ,” [here state  
 the offence as in the information] “ contrary to the form of the  
 “ statute, which offence has been duly proved before us the  
 “ said justices. We do therefore adjudge, that the said C D  
 “ hath forfeited for his said offence the sum of ”



[In cases where the magistrates exercise the power of mitigation, add these words] " which said sum of , we the  
 " said justices do hereby mitigate to the sum of "].  
 " Given under our hands and seals, the day of  
 " one thousand eight hundred and

" G H, J. P."

" J K, J. P."

3. *Form of warrant of commitment to gaol for a penalty.*

" County of } " To A B, officer of customs,  
 " to wit. } " and to E F, the gaoler or  
 " keeper of the at in the  
 " Whereas C D" [design him] " has been duly convicted be-  
 " fore us G H and J K, Esquires, two of his Majesty's justi-  
 " ces of the peace, of having" [state the offence as in the in-  
 " formation] " And whereas we, the said justices, did adjudge  
 " that the said C D had forfeited for his said offence the sum  
 " of " [If the justices mitigated the penalty, add]  
 " which sum we the said justices did mitigate to the sum of  
 " (And whereas it appears to us the said justices, that  
 " the said C D has not sufficient goods or chattels whereon to  
 " levy the said sum of , and) which said sum of  
 " , has not been paid ; these are therefore to re-  
 " quire you, the said A B, forthwith to take, carry, and convey  
 " the said C D to the at in the  
 " and to deliver him into the custody of the  
 " gaoler or keeper of the said ; and we, the said  
 " justices, do hereby authorise and require you the said E F,  
 " the gaoler or keeper of the said , to receive  
 " and take the said C D into your custody, and him safely to  
 " keep, until he shall duly pay the said sum of  
 " Given under our hands and seals, at in the  
 " county of this day of  
 " in the year of our Lord one thousand eight hundred and  
 " G H, J. P."  
 " J K, J. P."

4. *Warrant of distress.*

" County of } " To A B  
 " to wit. }  
 " Whereas C D" [design him] " has been duly convicted be-  
 " fore us, G H and J K, Esquires, two of his Majesty's justi-  
 " ces of the peace, of the offence of having" [here state the of-  
 " K 2

fence as in the information] “ And whereas the said C D has  
 “ forfeited for his said offence the sum of \_\_\_\_\_, which  
 “ said sum of \_\_\_\_\_ has not been paid ; these are  
 “ therefore to command you the said A B to levy the said sum  
 “ of \_\_\_\_\_, by distress and sale of the goods and chat-  
 “ tels of the said C D ; and we the said justices do hereby or-  
 “ der and direct the goods and chattels so to be distrained to  
 “ be sold and disposed of within \_\_\_\_\_ days after such  
 “ distraint, unless the said sum of \_\_\_\_\_, for which  
 “ such distress shall be made, together with the reasonable  
 “ charges of taking and keeping such distress, shall be sooner  
 “ paid. And you the said A B are hereby commanded to cer-  
 “ tify to us, the said justices, on the \_\_\_\_\_ day of  
 “ \_\_\_\_\_ next ensuing, what you shall do by virtue of this  
 “ warrant. Given under our hands and seals at  
 “ in the \_\_\_\_\_ this \_\_\_\_\_ day of  
 “ in the year of our Lord one thousand eight hundred and  
 “ G H, J. P.”  
 “ J K, J. P.”

5. *Form of information before justices of the peace, where the party charged is a seaman or seafaring man, and fit and able to serve his Majesty in his naval service.*

“ County of \_\_\_\_\_ } “ Be it remembered, that on the  
 “ \_\_\_\_\_ to wit. \_\_\_\_\_ } “ \_\_\_\_\_ day of  
 “ in the year of our Lord one thousand eight hundred and  
 “ \_\_\_\_\_, A B officer of customs, who is directed by the  
 “ commissioners of his Majesty’s customs to prefer this infor-  
 “ mation, gives us G H and J K, Esquires, two of his Majes-  
 “ ty’s justices of the peace, to understand and be informed,  
 “ that C D” [design him] “ being a subject of his Majesty,  
 “ and a seaman and seafaring man, and fit and able to serve  
 “ his Majesty in his naval service, on the \_\_\_\_\_ day of  
 “ \_\_\_\_\_ in the year of our Lord one thousand eight  
 “ hundred and \_\_\_\_\_ ” [here state the offence]  
 “ contrary to the form of the statute in that case made and  
 “ provided, whereby the said C D hath become liable to serve  
 “ his Majesty in his naval service, for the term of five years.  
 “ G H, J. P.”  
 “ J K, J. P.”

"County of                               } "Be it remembered, that on the  
"to wit.                                 } "  
"in the year of our Lord one thousand eight hundred and  
" , an information was exhibited before us G H and  
" J K, Esquires, two of his Majesty's justices of the peace,  
"against C D" [design him] "by A B, officer of customs,  
"which said information charged, that the said C D being a  
"subject of his Majesty, and a seafaring man, and fit and able  
"to serve his Majesty in his naval service, on the  
"day of                               in the year of our Lord one thousand  
"eight hundred and                               ," [here state the offence as  
in the information] "contrary to the form of the statute in that  
"case made and provided, which offence has been duly proved  
"before us the said justices; and it appearing to us the said  
"justices, that the said C D is a seafaring man, and fit and  
"able to serve his Majesty in his naval service, we the said  
"justices do therefore adjudge the said C D to serve in his  
"Majesty's naval service for the term of five years. Given  
"under our hands and seals, this                               day of  
"in the year of our Lord one thousand eight hundred and  
"G H, J. P."  
"J K, J. P."

" County of } " To A B, officer of  
 " to wit. } " and to the commander of  
 " one of his Majesty's ships of war.  
 " Whereas C D" [design him] " has been duly convicted be-  
 " fore us G H and J K, Esquires, two of his Majesty's justi-  
 " ces of the peace, upon the information of \_\_\_\_\_,  
 " officer of customs, of having" [here state the offence as in the  
 information] " And whereas the said C D has not proved that  
 " he is not a subject of his Majesty ; and being a seafaring man  
 " and fit and able to serve his Majesty in his naval service,  
 " we the said justices did adjudge the said C D to serve his  
 " said Majesty in his naval service for the space of five years,  
 " pursuant to the statute in that case made and provided ;  
 " These are therefore to require you the said A B to carry and  
 " convey the said C D on board of one of his Majesty's ships,

“ in order to his serving his Majesty in his naval service ; and  
 “ we, the said justices, do hereby require the commander of his  
 “ Majesty’s ship to whom this warrant is delivered, to receive  
 “ and take the said C D on board his said Majesty’s ship, in  
 “ order to his serving in his naval service for the period of five  
 “ years as aforesaid. Given under our hands and seals, at  
 “                                    in the                                    this                                    day of  
 “                                    in the year of our Lord one thousand eight  
 “ hundred and

“ G H, J. P.”

“ J K, J. P.”

8. *Form of information before justices of the peace, where the party charged is not a subject of his Majesty.*

“ County of                                    } “ Be it remembered, that on the  
 “                                    to wit.                                    } “                                    day of  
 “ in the year of our Lord one thousand eight hundred and  
 “                                    , A B officer of customs, who is directed by the  
 “ commissioners of his Majesty’s customs to prefer this infor-  
 “ mation, gives us G H and J K, Esquires, two of his Maje-  
 “ ty’s justices of the peace, to understand and be informed,  
 “ that C D” [design him] “ not being a subject of his Maje-  
 “ ty, on the                                    day of                                    in the year of  
 “ our Lord one thousand eight hundred and                                    ,”  
 [here state the offence, setting forth that the same took place  
 within one league of the coast of this kingdom] “ contrary to  
 “ the form of the statute in that case made and provided, where-  
 “ by the said A B hath forfeited the sum of

“ G H, J. P.”

“ J K, J. P.”

9. *Form of a conviction to be used in the case of the person charged not being a subject of his Majesty.*

“ County of                                    } “ Be it remembered, that on the  
 “                                    to wit.                                    } “                                    day of  
 “ in the year of our Lord one thousand eight hundred and  
 “                                    , an information was exhibited by A B, an offi-  
 “ cer of the customs, before us G H and J K, Esquires, two  
 “ of his Majesty’s justices of the peace, against C D,” [design  
 him] “ which said information charged, that the said C D on  
 “ the                                    day of                                    in the year of our  
 “ Lord one thousand eight hundred and                                    ,” [here  
 state the offence as in the information, setting forth that the

same took place within one league of the coast of this kingdom] “ contrary to the form of the statute in that case made  
 “ and provided ; which offence has been duly proved before us  
 “ the said Justices ; we do therefore adjudge, that the said  
 “ C D hath forfeited for his said offence the sum of  
 “ .” Given under our hands and seals, this  
 “ day of                      in the year of our Lord one thousand  
 “ eight hundred and

“ G H, J. P.

“ J K, J. P.

10. *Form of a warrant of commitment to gaol, of a person not being a subject of His Majesty.*

“ County of                      } “ To A. B. officer of Customs  
 “                      to wit.                      } “ and to E. F. the gaoler or keeper  
 “ of the                      at                      in the  
 “ Whereas C D” [design him] “ not being a subject of His  
 “ Majesty, has been duly convicted before us G H and J K,  
 “ Esquires, two of His Majesty’s justices of the peace, of  
 “ having” [here state the offence as in the information, setting  
 forth that the same took place within one league of the coast  
 of this kingdom] “ And whereas We, the said justices, did  
 “ adjudge, that the said C D had forfeited for his said offence  
 “ the sum of                      which said sum of  
 “                      has not been paid ; These are therefore to  
 “ require you, the said A B forthwith to take, carry, and con-  
 “ vey the said C D to the                      at                      in the  
 “ and to deliver him into the custody of the gaoler or keeper  
 “ of the said                      ; and We, the said justices, do here-  
 “ by authorise and require you, the said E F, the gaoler or  
 “ keeper of the said                      to receive and take the  
 “ said C D into your custody, and him safely to keep until  
 “ he shall duly pay the said sum of                      . Given  
 “ under our hands and seals at                      in the  
 “                      this                      day of                      in the  
 “ year of our Lord one thousand eight hundred and                      .”

“ G H, J. P.”

“ J K, J. P.”

11. *Form of an information against an officer of customs.*

“ County of                      } “ Be it remembered that, on the  
 “                      to wit.                      } “                      day of  
 “ in the year of our Lord one thousand eight hundred and

“ , A B, officer of the customs, who is directed  
 “ by the commissioners of his Majesty’s customs to prefer this  
 “ information, gives us , Esquires, two of  
 “ his Majesty’s justices of the peace, to understand and be in-  
 “ formed that C D, officer of the customs, on,” &c. [here state  
 the offence] “ contrary, &c. whereby the said C D has forfeit-  
 “ ed the sum of

“ G H, J. P.”

“ J K, J. P.”

[The forms of conviction and commitment, numbered 2 and 3, may be applied to this case.]

For the amount of bail in certain offences against the revenue, see *Bail*, sect. To find Bail.

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## FAIRS AND MARKETS.

It is understood to be usual, and seems proper, that one or two justices be present at fairs and markets, with some peace officers, for preserving order, and for granting warrants, if necessary.

It may be mentioned that, by the act of parliament rectifying the kalendar, fairs and markets, then existing, depending on the nominal days of months, and all courts incident to such, are directed to be held according to “ the same natural days ; “ that is to say, eleven days later” (*a*). See farther as to Old Style, *Tack*, sect. Landlord’s Obligations, Note ; *Servant*, sect. Servant’s Obligations, Note ; *Fishing*, sect. Salmon, Note.

Whether stolen goods sold in markets be transferred, see *Sale*, sect. What may be Sold.

See *Falsehood*, &c. sect. False Weights and Measures—*Forestalling and Regrating*—*Hawkers and Pedlars*.

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## FALSEHOOD AND FRAUD.

### I. FORGERY OF WRITINGS.

THE more audacious and dangerous kinds of forgery, or fal-

(*a*) 24 Geo. II. c. 23, sect. 4.

falsification of writings, *e. g.* feloniously making and publishing a writing, to the prejudice of another, as the signed instrument of a person who has not subscribed it, are punishable capitally, by practice (*a*); but the Court of Justiciary have the power of mitigation (*b*).

By special statute, it is made capital to *forge or alter*, in Great Britain, "any deed, will, testament, bond, writing obligatory, bill of exchange, promissory-note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, acceptance of any bill of exchange, or any acquittance or receipt either for money or goods or any accountable receipt for any note, bill, or other security for payment of money, or any warrant or order for payment of money or delivery of goods with intention to defraud," or to "offer, dispose of, or put away," such forged or altered writ (*c*), or to forge or alter any bond or obligation of the Bank of England, or any indorsement upon it, or to offer or dispose of such forged or altered writ, or to demand money upon it, from such bank, in order to defraud it, or any other person or body, knowing it to be forged or altered (*d*).

It will not avail the person accused of the forgery of writings, that the subscription has been awkwardly imitated (*e*). Nor is it material that there has been no imitation at all; as, where the name of a person who cannot write is forged (*f*); or where the name of the forger (which he adhibits) happens to be the same as that of the party who is feloniously personated (*g*); or, perhaps, where the name is fictitious, with the assumption of a certain character and description to gain credit (*h*); or where notaries sign for a person who has given them no authority (*i*); or where one personates another, and authorises notaries to sign a deed in his name (*j*).

It rather appears, that the tearing off a genuine subscription, and affixing it to a false deed, and the insertion of a bill or promissory-note or the like, in an interval above a genuine subscription, are punishable capitally (*k*).

The forgery of the names of witnesses to a deed may not be capital (at least, unless it be false *in gremio*, by antedating or otherwise, for some fraudulent purpose), for the deed is not theirs; but it is capital to forge the names of witnesses to a

(*a*) Hume, l. 133—137.

(*b*) Ibid. 155.

(*c*) Hume, l. 137.

(*i*) Ibid.

(*j*) Hume, l. 140.

(*e*) 45 Geo. III. c. 89, sect. 1.

(*f*) Ibid.

(*g*) Ibid. 138.

(*k*) Ibid. 141.

(*d*) Sect. 2.

(*h*) Ibid. 139.

notarial instrument, for the instrument is as much theirs as the notary's (*a*).

It is not material whether the writing be a formal deed, or otherwise (*b*); or whether it be good in law (*c*); or whether it be a private or a public deed (*d*). The smallness of the sum, though it may sometimes mitigate, does not alter the capital conclusion, so as to entitle to bail (*e*).

In the falsehood of writings (which it has in common with all the species of this offence) the crime is not complete by the fabrication of the writing, unless it be also uttered or put to use (*f*). It is as presumed utterer, or privy to the uttering, that the forger is punished (*g*). It is not necessary that the deed pass as genuine; it is sufficient that it has been offered or used as such (*h*). Giving it to an accomplice as false, is not uttering in this sense; though, if the accomplice utter it, the giver is art and part of the uttering; but it is a crime of its own kind, and punishable with transportation (*i*). By a late statute, however, (of which this section has, by the narrowest majority, been found to extend to notes issued by the Bank of Scotland, as well as to the notes of the Bank of England (*j*), for it undoubtedly extends to Bank of England notes in Scotland), it is punishable with 14 years transportation, knowingly to receive any forged bank notes, bank bills of exchange, bank post bills, or blank bank notes, blank bank bills of exchange, or blank bank post bills, or to possess such without excuse (*k*).

The forgery must be felonious, or with intent to injure. Thus, it is not forgery (though incorrect) if, to accommodate another who cannot write, and, at his desire, a person sign a draught or receipt in the name of that other. But it is forgery, if there be a purpose to gain any sort of advantage, though it should not amount to cheating; for instance (though the excuse might be considered in the sentence) to frame a voucher for a debt, though justly due (*l*).

A person is art and part of forgery, and punishable as the forger, by immediate assistance lent to the fabrication; as scrolling, dictating, writing, or signing (*m*). He is also art and part, by wittingly using the false writ, though not from the first privy to its character (*n*). He is so also by procuring the forgery (*o*). With regard to remote assistance in the exe-

(*a*) Hume, i. 141—2.

(*b*) Ibid. 142.

(*c*) Ibid.

(*d*) Ibid. 143.

(*e*) Ibid. 144.

(*f*) Ibid.

(*g*) Ibid. 145.

(*h*) Ibid. 146.

(*i*) Ibid. 146—9.

(*j*) Ibid. 145.

(*k*) 45 Geo. III. c. 89, sect. 6.

(*l*) Hume, i. 150.

(*m*) Ibid.

(*n*) Ibid. 151.

(*o*) Ibid. 152.



cution, if the tradesman employed to make the plate, or the like, know of its unlawful destination, and be in society with the forger and vender, he is art and part; if he merely execute the work in the course of trade, though he may have suspicions, he seems not punishable; if he receive an extraordinary reward, probably he may have a suitable punishment (*a*). For the protection of bankers, however, special provisions have been made by recent statutes, to prevent remote assistance towards forging their writs. It is declared punishable with seven years transportation, to make, or cause be made, on any plate, a bill or note of any banker, or to use such plate, or to use any other device for making such bill or note, or knowingly to possess such plate or device, or knowingly to dispose of such bill or note, without written authority (*b*). It is declared punishable, with imprisonment from one to three years for the first offence, and seven years transportation for the second, to make on any plate the subscription of a bill or note of a banker, payable to the bearer on demand, or knowingly to possess such plate (*c*). It is declared punishable with imprisonment from six months to two years for the first offence, and seven years transportation for the second, to make or use any frame for making paper with the name of any banker in the substance, without written authority, or to make, expose to sale, or dispose of such paper; or to cause such name to appear in the substance of the paper on which the writing is, without written authority (*d*). It is specially provided, for the protection of the Bank of England (by an act extending to Scotland) that it is punishable with 14 years transportation, to make, on a plate of any materials, any note, bill of exchange, post bill, blank note, blank bill of exchange, or blank post bill, of that bank, or to use such plate, or to use any device for making such note, &c. without written authority, or knowingly to possess such plate or device (*e*); and that it is capital for any person, not authorized by that bank, to make or use, or cause to be made or used, or knowingly, without excuse, to possess any instrument for making paper with waving lines, or with any sum in words, in Roman letters, in the substance of the paper, or to make, use, expose, or dispose of, or knowingly to possess such paper; or to cause the sum of any note or bill to appear in words, in the substance of the paper (*f*). And the Bank of England having formed a new plan for printing their notes, having a dark ground with

(*a*) Hume, l. 153—4.

(*c*) Sect. 3.

(*d*) Sect. 1.

(*f*) 45 Geo. III. c. 89, sect. 3.

(*b*) 41 Geo. III. c. 57, sect. 2.

(*e*) 45 Geo. III. c. 89, sect. 7.

white letters, &c. it has been enacted, that persons engraving, &c. on any plate, for producing an impression of any part of such note, without authority, or using such plate, or having such plate in their custody, or uttering any impression from it, may be transported for 14 years (*a*); and the same provisions are made with regard to plates producing an impression *resembling* a note of the Bank of England (*b*).

A falsehood, asserted in an instrument or execution, by a notary, messenger, or other officer, which is a species of this crime, is not punished capitally, except in the case of notaries; of the capital convictions of whom there have been instances, though of an old date (*c*).

The fraudulent corruption or alteration of a genuine deed seems only punishable arbitrarily, in any case not falling within the statute against alterations, cited in the beginning of this article (*d*).

Forgery of writings may be tried either before the Court of Justiciary, or before the Court of Session (*e*). Though inferior courts may judge incidentally in the improbation of executions relative to actions before themselves, and of any writs which are produced in such actions, and are there challenged forged, by reply or exception, the two supreme courts only can try forgery directly (*f*).

## II. FALSEHOODS AGAINST THE REVENUE.

Several species of falsehood or forgery, with regard to the different branches of the revenue, have been made capital by the statutes (which it would be improper to attempt to enumerate) with regard to those branches (*g*); particularly in the case of stamps, where revenue is collected in that form. Several minor species of such falsehood have had specific arbitrary punishments assigned to them. All such falsehoods are punishable arbitrarily at common law (*h*).

## III. FALSEHOODS AND FRAUDS IN GENERAL.

The common law effectually restrains, by a suitable arbitrary punishment, all crimes of the general description of fraud, in whatever form; particularly the following.

(1.) *Conspiracy*.—Any sort of conspiracy or machination, directed against the fame, safety, or state of another, and

(*a*) 1 Geo. IV. c. 92, sect. 1.

(*b*) Ibid. sect. 2.

(*c*) Ibid. 158—164.

Erskine, iv. 4. 68—Hume, i. 164.

(*h*) Hume, i. 164—5.

(*e*) Hume, i. 154.

(*d*) Ibid. 155—8.

(*f*) 1557, c. 62.—Bankt. i. 10. 221—

Erskine, iv. 4. 68—Hume, i. 164. (*g*) Modified by 52 Geo. III. c. 143.

meant to be accomplished by deceitful contrivances, to the suppression of truth, is punishable arbitrarily, at common law (*a*).

(2.) *False character*.—The false assumption of any official character, for the purpose of breaking any point of public discipline or order; *e. g.* to celebrate marriage as a clergyman, (see *Marriage*, sect. Irregular); or to assume the character of an excise officer, and, as such, to search houses and extort money, is also punishable arbitrarily at common law (*b*).

(3.) *Swindling*.—The obtaining of money or goods, by fraud or cheating, and particularly by a false assumption of name, character, commission, or errand, is also punishable arbitrarily, at common law (*c*).

(4.)—*False weights and measures*.—The using of such is punishable at common law as a fraud.

The ancient Scots standard of *extension* was the ell of 37 Scots inches (*d*). The ancient Scots standard of *weight* seems to have been the French troy stone (*e*). The ancient Scots standard of *capacity* was for liquids, the Stirling pint jug, containing 3 lb. 7 oz. of the above French troy weight of clear water (*f*); and for dry goods, the Linlithgow firloft, which, for wheat, rye, beans, pease, contained 21 pints 1 mutchkin of the Stirling jug; and for malt, barley, and oats, 31 pints (*g*). And the using of false weights and measures was declared to be punishable by various ancient statutes, some of which expressly gave the matter in charge to sheriffs and stewards, justices of the peace, and magistrates of boroughs; and at the same time directed them to enforce conformity to the ancient standards (*h*). But in many places local variations continued to prevail.

By an article of the Treaty of Union in 1707, it was provided that the Scots standards should be assimilated to the English. That provision, however, was not effectually carried into execution; but the use of the English standards has gradually gained ground in Scotland.

In 1824, an act was passed for ascertaining and establishing uniformity of weights and measures in Great Britain and Ireland; the time of commencement of which was prolonged by an act in 1825 (*i*). By those acts, an "imperial standard yard," is established as the only standard measure of *extension*. [This has been found to contain 35·9419 Scots inches].

(a) Hume, i. 166—8.

(b) Ibid. 168.

(c) Ibid. 168—172.

(d) 1618, 19 February.—1621, c. 17.—1643, c. 18.—1685, c. 44.

(e) 1618, 19 February.—1621, c. 17.

(f) Ibid.

(g) Ibid.

(h) Leg. Burg. c. 74.—1493, c. 47.—1607, c. 2.—1661, c. 38.

(i) 5 Geo. IV. c. 74.—6 Geo. IV. c. 12.

An "imperial standard troy pound," is established as the only standard measure of *weight*, one-twelfth to be an ounce, one-twentieth of the ounce to be a pennyweight, and one twenty-fourth of the pennyweight to be a grain ; and the pound avoirdupois to contain 7000 grains, of which the pound troy contains 5760, one-sixteenth to be an ounce, and one-sixteenth of the ounce to be a dram. [The Scots pound, of which there were sixteen in the stone, has been found to contain 7608·95 of such grains]. An "imperial standard gallon" is established, containing 10 lb. avoirdupois of water, as the only standard measure of *capacity* for liquids and for dry goods, not measured by heaped measure ; one-fourth of the gallon to be a quart, one-eighth of the gallon to be a pint, two gallons to be a peck, eight gallons to be a bushel, and eight bushels to be a quarter of corn or other dry goods, not measured by heaped measure. [This gallon has been found to contain 277·274 imperial cubic inches, and the peck 554·548. The Scots gallon for liquids to contain 833·6272 imperial cubic inches. The English wine gallon to contain 231. The Scots peck for wheat, &c. 553·581. The Scots peck for barley, &c. 807·576]. The standard for *heaped measure* for coals, culm, lime, fish, potatoes, or fruit, and other things commonly sold by heaped measure, is declared to be the bushel containing 80 lb. avoirdupois of water, round with a plain and even bottom, 19½ inches from outside to outside, to be heaped in the form of a cone of at least six inches in height (but such things may be sold by weight) ; and all other measures than the bushel are directed to be made cylindrical, the diameter at least double the depth, and the height of the cone to be equal to three-fourths of the depth. Justices of the peace and magistrates of cities and royal burghs are directed to provide standards for use. All contracts by weight or measure, where no special agreement is made to the contrary, are to be deemed to be according to the standards ; and in case of such special agreement, the proportion between the local weight or measure and the legal standard must be expressed, otherwise the agreement is null. Existing weights and measures may be used, being marked so as to show the proportion which they bear to the standards ; but no new weights or measures are to be made otherwise than according to the standards. Provision is made for ascertaining rents, &c. payable in grain or malt, &c. by juries, before sheriffs in Scotland. And the Commissioners of the Treasury are to prepare and publish tables of equalization between the weights and measures formerly in use, and the legal standards.

To constitute the guilt of using false weights and measures ;

1st, The deficiency of weight or measure must be manifest and material, such as is injurious to the customer, and cannot be supposed to pass unobserved on the part of the user (*a*). 2dly, The false weights or measures must have been used and given out for the true (but this may be done tacitly, and will be presumed against the user) and the traffic must have been carried on accordingly (*b*). 3dly, They must be charged to be different from the legal standard; for, if the charge be only of a deviation from the customary weight or measure of the neighbourhood, this, without some special device or dole, by which deception has been occasioned, does not seem sufficient (*c*).

It is substantially the same offence with the use of false weights and measures, if a dealer in any commodity, such as bread, which has a known weight assigned to it by public authority, shall make and expose it of a lower weight (*d*). There are special provisions with regard to the weight of bread, the execution of which is committed to Justices. See *Bread*.

The usual course is understood to be, the destruction of the improper weights or measures, and a fine; or, in an aggravated case, imprisonment; and, sometimes, in the case of *vivres* made up into quantities of known denomination, *e. g.* quartern loaves of bread, pounds of butter, &c. exposed of improper weight, the confiscation of the article.

It is not an uncommon device to use a beam of unequal arms, or scales of unequal weight, placing the article to be sold at the longest arm, or in the heaviest scale. This is substantially the same offence as using false weights, and is punishable in the same manner at common law as a fraud. It is easily detected, by transposing the article and the weight.

Justices of the peace may prepare more aggravated cases of fraud for higher courts. (See *Arrest, &c.*) They seem to be competent to punish inconsiderable cases; but it appears expedient that cases, not of the lowest order, should be allowed to devolve upon the sheriff. (See *Justices*, sect. Second Assignment of Commission.)

See *Crime in General*.—*Bankruptcy*, sect. Fraudulent Bankruptcy.—*Coin*.—*Ships, destroying*.

(*a*) Hume, i. 172.

(*b*) Ibid.

(*c*) Ibid. 173.

(*d*) Hume, i. 173.

## FIARS.

It is almost unnecessary to mention, that *striking the fiars* is the fixing the prices of grain, of the growth of the county, for the preceding crop; which are generally used to ascertain the conversion of corn rent, and sometimes to ascertain the value of grain in ordinary contracts (*a*). The fiars are struck by the sheriff of each county, in February, with the assistance of a jury. Justices of the peace have no concern in fixing them; but, in the exercise of their civil jurisdiction under the small debt act, they may sometimes have occasion to apply them.

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FISHING.

## I. SALMON.

It is directed, that justices of the peace shall put the acts of Parliament into execution against “slayers of red and black fishes and smolts in forbidden time;” “setters of croves and nets in waters and dams, having and keeping of croves and yairs in forbidden time;” and shall proceed in the trial, “by witnesses, or oath of party; and that the punishment to be inflicted shall be a pecunial sum, answerable to the circumstances of the offence, and quality of the offender (*b*).” The judges having authority to punish the killing of red fish, smolts, and fry of salmon, are directed to hold courts for that purpose at Easter and Michaelmas yearly, under the penalty of 500 merks, if, on being required, they neglect to do so (*c*).

(1.) “*Slayers of Red and Black Fishes, and Smolts, in forbidden time.*”—During a certain time, called *close* or *forbidden* time, the catching of salmon is prohibited; partly, because the salmon are at that time improper for food, and partly because their preservation at that time is necessary for the multiplication of the species. The general forbidden time, prescribed by the old acts (which, however, is in some instances modified by local acts, the spawning season being different in different rivers) is between the feast of Assumption (15th

(*a*) See Erskine, iii. 3. 4.

(*b*) 1617, c. 8.—1661, c. 38.

(*c*) 1705, c. 2.

August) and the feast of St Andrew (30th November) (*a*). It is now, in consequence of the alteration of the kalendar or style (*b*), observed 11 nominal days later; 26th August and 11th December (*c*).

The punishment for killing salmon in forbidden time is L.10 Scots for the first offence, L.20 Scots for the second, and death for the third (*d*). Death is of course out of the question; the justices inflict a higher pecuniary penalty for the third offence. It is understood that they do not usually, for the first and second offences, exceed the sums specified in the act. Those fines are to be levied without composition (*e*). Half of them goes to the informer, half to the king (*f*). Two acts declare the slaying of salmon in forbidden time, or of kipper, smolts, or sick black fish at any time (to which perhaps justices are competent) to be punishable as theft (*g*). It may be questioned, whether the justices, who are, by the general acts before quoted, limited to a fine, may not, under these acts, inflict an arbitrary fine. Those art and part of killing salmon in forbidden time are to be punished as the principals (*h*).

It is illegal, in smolt time, to set vessels, creels, weirs, or any other engine, to prevent the smolts or young salmon fry from getting to the sea; and the punishment is the same, in every respect, as that first above mentioned, for killing salmon in forbidden time (*i*). Justices are perhaps competent to the extent of a small fine.

(*a*) 1424, c. 36.

(*b*) 24 Geo. II. c. 23.

(*c*) It is understood to be the common practice (although salmon fishing is not mentioned in the act now cited, for altering the style) to add those 11 days, in order to keep the time on the same natural days; though indeed the error in the old style, in 1424, when the forbidden time was fixed, since 325, from which the error is observed, amounted only to about eight days. Some think that a twelfth day ought now to be added, because 1800, which would in common course have been a leap year, is declared by the act not to be such; but it is doubted whether this be authorized, either by the expressions of the act, which allude to 11 days as the fixed difference between old and new style in all time coming; or by its principle, which is to arrest the error of computation at 11 days, and, by certain modifications of the leap years, to carry on the computation correctly in time to come; and, accordingly, among other things, the Court of Session, which is directed to be held on the same natural days as before the correction of the style, sits and rises on the same nominal days as before 1800. No doubt, if old style had been allowed to go on, there would now have been 12 days of difference; and there are so, in one or two nations which have not corrected their kalendar. But old style, in this country, seems to signify the same real or natural time as at the correction of the kalendar.

(*d*) 1503, c. 72.

(*e*) 1535, c. 16.

(*f*) 1698, c. 33.

(*g*) 1600, c. 11.—1606, c. 5.

(*h*) 1449, c. 9.—1457, c. 85.

(*i*) 1503, c. 72.—1535, c. 16.

Millers who slay smolts or trouts with creels, or any other engine, and "any who dams or laves," are to be punished as slayers of red fish (*a*). Perhaps justices are competent to impose a small fine for this offence; at least, for killing smolts or trout.

Fishing salmon at mill-dam dykes, with stent nets or any engine, is prohibited, under the penalties for killing black fish, and destroying salmon fry (*b*). Perhaps justices are competent to inflict a small fine.

In those points, however, marked as doubtful, the jurisdiction of the justices is very liable to question; and it is perhaps more advisable that they should be allowed to fall into the hands of the judge ordinary.

(*2.*) "*Setters of croves and nets in waters and dams, having and keeping of croves and yairs in forbidden time.*"—A *cruive* is commonly used to signify a wooden box of a particular construction, placed in a dyke stretching across a river. On the side of the box next the mouth of the river there are valves, thin narrow boards, or wickets of small spars, called *inscales*, so placed angularly that the current keeps them close, unless they be forced open; so that they close upon any salmon which enters by them: On the opposite side of the box are *hecks*, composed of bars placed three inches asunder, so that only the small salmon, of those which have entered the box, can pass up the river. In this way, all large salmon, going up the river, unless they get over the dyke, are detained in the box. A *yair* is generally an inclosure in a river, made of stones or close wicker work, into which the salmon enter by a narrow passage left for the purpose, and from which few find the way out.

Though *cruives* are not allowed to stand in forbidden time, which has been already described, otherwise the justices may inflict a suitable fine, it is not necessary at that time to remove the sole trees or side posts of the *cruives*; the removing of the *hecks* and *inscales* is sufficient (*c*). When, in forbidden time, the *cruives* are taken away, it is not lawful to fill up with stones or other materials the places from which they are taken (*d*).

The *Saturday's slop* (which is an opening of an ell wide, 37 inches, in each *cruive* from six o'clock on Saturday evening till Monday at sun-rising) (*e*), is directed to be observed in all

(*a*) 1685, c. 20.

(*b*) 1696, c. 33.

(*c*) Lord Banff against Earl of Fife, 21st January 1783.

(*d*) Lord Halkerton against Scott, 4th July 1769.

(*e*) Fishers on Northesk against Scott, 16th July 1746, Falc.



cruives, under a penalty of L.5 Scots (*a*). It is not indispensable that the inscales be taken out from the cruives "in times of flood;" it is sufficient, at such times, to fix them back, so that they may remain open for the purpose of the Saturday's sloop (*b*). The non-observance of the Saturday's sloop is perhaps competent to be prosecuted before justices, as being a species of forbidden time; but an action before the judge ordinary is the usual mode of redress.

## II. HERRINGS AND WHITE FISH.

Justices of the peace have certain duties imposed upon them, with regard to the deep sea white herring fishery, by recent acts (*c*), containing a variety of regulations, and enacting a variety of penalties and forfeitures, into the details of which it is unnecessary to enter, as the matter concerns few justices, and as the acts founded on will be produced when application is made to them.

There is a general enactment, that any fine, penalty, or forfeiture, under the acts of 48 or 55 George III. cited, when not otherwise provided, may be sued for, recovered, levied, and mitigated, as any fine, penalty, or forfeiture, by any law or laws of customs or excise (*i. e.* by two justices, see *Excise and Customs*, sect. Recovering Penalties) or in the courts at Westminster, or in Exchequer in Scotland (*d*).

It is specially provided, in amendment of an older act (29 George II. c. 23) that if any white herrings be cured, packed, or put up in Great Britain, or on board any vessel employed in the British herring fishery, in any barrel, in whole or in part of fir, or not of the thickness of half an inch throughout of made work, or not containing 32 gallons of English wine measure, the barrel and herrings may be declared forfeited, on

(*a*) 1424, c. 11.—1477, c. 73.—1489, c. 15.—1685, c. 20.

(*b*) Lord Halkerton against Scott, 4th July 1769; as affirmed on appeal. *Note*.—There are a variety of questions as to the proper construction of cruives, the legality of particular modes of fishing, the opening in mill-dams, &c.; but these seem competent only before the Court of Session, or the Judge Ordinary. The regulation, in some old acts, that an opening shall at all times be left in the middle of the stream in cruives or yairs, has long been in disuse.—Heritors of Fishing of Don against Town of Aberdeen, 26th January 1665, Stair's Coll. i. 255.—Mackenzie's Observations on Act 1424, c. 11.

(*c*) 48 Geo. III. c. 110, containing a variety of regulations; temporary.—51 Geo. III. c. 101, extending certain bounties to vessels of a lower tonnage than in the preceding.—52 Geo. III. c. 153, correcting a verbal mistake in 51 Geo. III.—54 Geo. III. c. 102, continuing these acts for a short period.—53 Geo. III. c. 94, rendering them perpetual, unless where modified, and containing farther regulations.

(*d*) 55 Geo. III. c. 94, sect. 42.

proof before two justices ; and any officer of the fishery, customs, or excise, may seize them (a).

In case of a dispute between an officer of the herring fishery and a curer, any one justice of the peace, to whom application is made by either party, is to appoint two skilful persons, not having an interest in the dispute, one to be named by the officer, one by the curer, and failing such nomination by either party within the time to be appointed by the justice, not longer than 24 hours after the appointment, the justice is to make the nomination in his place. Those two persons are to examine the matter in dispute, and to certify their opinion, on oath, to the justice. If they agree, their decision is final. If not, the justice is to require them to name a skilful neutral person, who is to examine the matter, and to report his opinion, on oath, which is to be final (b).

The staves of every barrel in which wet white fish are packed for exportation are directed to be half an inch thick at the bulge, and full bound, otherwise the barrel and fish are to be forfeited, on proof before a justice (c).

### III. LOBSTERS.

The killing of lobsters on the coasts of Scotland, from 1st June to 1st September yearly (at which time they crawl close to the shore to spawn) is forbidden under the penalty of L.5 sterling for each offence, to any person who sues for it summarily before any two justices of the peace (d).

For seamen in the fishing service, see *Seamen*, sect. Seamen in the Merchant and Fishing Service. For the exemption of fishermen from impress, see *Seamen*, sect. Impressing.

See *Lint Steeping*.

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## FORESTALLING AND REGRATING.

FORESTALLING and REGRATING, and certain other operations in commerce, which it is now unnecessary to describe, were at one time prohibited by various statutes, under severe

(a) 55 Geo. III. c. 94, sect. 12.

(b) Sect. 36.

(c) 26 Geo. III. c. 81, sect. 18.

(d) 9 Geo. II. c. 33, sect. 4.—*Note.* 31 Geo. III. c. 51, and 48 Geo. III. c. 144, with regard to oysters, seem limited to England.

sanctions; and justices are by their commission directed to punish them. But none of them have for more than two centuries been prosecuted in the Supreme Criminal Court (*a*), as they were found to be divisions of labour beneficial to all concerned, particularly to the consumer. And some very severe statutes in England against forestalling, &c. have been repealed; "it having been found that such statutes had a tendency "to discourage the growth of victual, and enhance the price "thereof" (*b*).

In a late case the Court of Session expressed strong disapprobation of every interference by magistrates and judges with the free circulation of the necessities of life, as such interferences (it was observed) instead of diminishing, increase scarcity (*c*).

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## FORUM.

A PERSON is not bound to appear as a defender in any court indifferently. He must have some special connexion with the territory before its courts can be considered as his *forum*. It is the *defender's forum* only that is of any consequence. The pursuer must follow it.

### I. CRIMINAL CASES.

The most proper *forum* in criminal prosecutions is the *forum delicti*, the court of the territory in which the crime was committed (*d*). A person passing through a territory, not being domiciled in it, and committing a crime there, is answerable to its courts, if, after his crime, he be apprehended in it, or brought into it (*e*), (see *Arrest*, &c. sect. *Arrest*) and is dealt with as in ordinary cases. (See *Arrest*, &c.—*Commitment—Bail—Liberation—Process*).

(*a*) Hume, i. 503-5.

(*b*) Williams' J. P. *vs.* Forestalling, &c.

(*c*) *Lieshman against Magistrates* of Ayr, 8th March 1800.

(*d*) Hume, ii. 55.

(*e*) *Ibid.*—*Note.* Provision is made that felonies committed in vessels employed in inland navigations, and in stage coaches, or such carriages, by opening packages, may be indicted as having been done in any county through which, or along the borders of which, they have passed, and may be tried in such county; and a similar provision is made, that felonies committed on the boundaries of counties, or within 500 yards of the boundaries, may be alleged to have been committed in any of the counties, and

Another *forum* sometimes spoken of is the *forum domicilii*, the court of the territory in which the delinquent has his domicile (by which is meant the house in which a person has resided as his home, with his family, for the last 40 days) (*a*), though the crime was committed in another territory. It seems now to be pretty much fixed that this *forum* would not, in the ordinary case, be sustained in Scotland for an offence committed in England or any other foreign country. The case is different with regard to those crimes which have a continuance of time and succession of acts, of which part may happen here and part abroad: if a man forge a deed abroad, and utter it here, the courts of this country are the proper courts for trying the offence (*b*). With regard to this question, as occurring before an inferior court of Scotland, in the jurisdiction of which a party is domiciled, for an offence committed in the territory of another inferior court of Scotland, the court of the domicile is not competent. This has been expressly found in the case of pecuniary penalties for offences against the game laws (*c*).

Another *forum* sometimes mentioned is the *forum deprehensionis*, the *forum* of the territory in which the delinquent is apprehended, but in which he neither committed the crime nor has his domicile. It does not appear that any Scots court can upon this ground try a person for a crime committed in England, or in any other foreign country. The case seems otherwise (even at common law), where the offence has a continuance in this country, as if he should steal goods abroad, and escape with them into this country (*d*). And it has been provided by special statutes, that offenders escaping with stolen goods from any one of the three united kingdoms into any other of them, may be tried for the theft in the place where they shall be found with such goods in their possession; and that persons receiving such stolen goods may be tried for that of-

may be tried in such county (59 Geo. III. c. 27 and c. 96). But those provisions seem only to regard *indictments for felonies* before the Supreme Courts, and not to be intended to extend the jurisdiction of inferior judges, except, perhaps, so far as regards the power of precognition for felonies in vessels and coaches, and on the boundaries of counties. The provision with regard to *trial* in any county seems to regard a doctrine of the law of England, that indictments can only be tried, even before supreme judges, in the county in which the crimes were committed. (See Jacob's Law Dict. *voce* Indictment.—Blackstone, iv. 304).

(*a*) Erskine, i. 2. 16.

(*b*) Hume, ii. 51-3.

(*c*) Advocacy and suspension, Andrew Clephane, 7 February 1810; in the Court of Justiciary; Hume, ii. 56, Note.—Buchanan against Weir, 28th May 1818; in the Court of Session; Fac. Coll.; Hume, *ibid*.

(*d*) Joseph Taylor, March 1767, in M'Laurin, No. 70.—Hume, ii. 53, 54.

fence in the place where they receive them, without regard to the place where the goods were stolen (*a*). With regard to the trial of a person before one inferior court of Scotland, within the territory of which he has been apprehended, for an offence committed within the territory of another of those courts, this appears to be incompetent, except probably in the case of continuous crimes above alluded to (*b*).

Another *forum* sometimes mentioned is the *forum originis*, the place of birth. The circumstance of birth within Scotland founds jurisdiction in treason. It also founds jurisdiction in other crimes where a person permanently settled abroad commits a crime when on a visit to his native country and escapes, to the effect that such person may be outlawed. But, except perhaps in certain special cases between Scotsmen, it does not found jurisdiction with regard to crimes committed abroad (*c*).

With regard to the arresting in a territory different from that in which the offence was committed, for trial elsewhere, see *Arrest*, &c. sect. Crime beyond territory.

## II. CIVIL CASES.

The *forum domicilii* of the debtor (which has already been explained) is the principal *forum* in civil cases. This is clearly a competent *forum* in the case of ordinary civil claims, arising from civil contract, express or implied, and also in the case of claims pursued in one county for civil conclusions arising from any act of a criminal nature committed in another county of Scotland. Doubts have been expressed how far this would reach the latter description of claims arising from offences committed in a foreign country (*d*); but there hardly appears to be any good reason why the defender may not be pursued before the court of his domicile, for the expence, for example, of curing the bruises received by the pursuer from him in an assault in a foreign country, or other the like damage, in the same manner as for any other obligation arising from his own act. The party injured might otherwise be entirely deprived of reparation.

A person may have establishments in two jurisdictions, such as to give him a domicile in both, and to make him amenable to the courts of both.

A person having no fixed domicile, as a travelling merchant

(*a*) 13 Geo. III. c. 31.—44 Geo. III. c. 92.

(*b*) Hume, li. 56, and the expressions of the interlocutor in the case of Clephane there cited.

(*c*) Hume, li. 49-51.

(*d*) Hutcheson's J. P. 3d edit. i. 108.

or a soldier, may be pursued in any territory in which he is personally cited (a).

Another *forum* is the *forum contractus*, the court of the territory in which the contract pursued upon was entered into, the defender having had his domicile there at the time of entering into the contract, though he had ceased to be domiciled there when the action was raised. But it is necessary in this case that the defender be actually within the judge's territory, and be cited by a warrant from his court (b).

Where one to be cited, not as a principal defender, but merely for his interest (which however can rarely happen before justices) does not reside in the same jurisdiction as the principal defender, he is cited (unless he choose to appear upon private notice) upon letters of supplement from the Court of Session.

Another *forum* is that which arises *ratione rei sitæ*, from the subject claimed lying within the territory; the defender, if not domiciled within the jurisdiction of the inferior court, being cited by letters of supplement from the Court of Session (c). But it does not appear that the civil jurisdiction of justices of the peace extends to a real claim to any subject whether moveable or immoveable; and they can hardly have occasion to exercise jurisdiction arising from this source.

Where a person residing abroad has moveable effects in Scotland, an action may be brought against him if those effects be attached by an arrestment *jurisdictionis fundandæ causâ*, which may be obtained by the creditor, either from the Court of Session, from the Court of Admiralty, or from the judge ordinary of the place where the effects are situated (d); but it appears not from justices of the peace.

See *Border Warrant—Meditatio Fugæ—Arrest, &c.*

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## FRIENDLY SOCIETIES.

Any number of persons in Great Britain may form themselves into a society of good fellowship, "for the purpose of raising, from time to time, by subscriptions of the several members of every such society, or by voluntary contributions, a stock or fund for the mutual relief and maintenance of all and every the members thereof, in old age, sickness, and infir-

(a) Erskine, i. 2. 16.

(b) Ibid. 20.

(c) Ibid. 17.

(d) Ibid. 19.

"mity, or for the relief of the widows and children of deceased members;" and may, by a majority of themselves, or of a committee named for the purpose, make rules, or alterations of those rules, not inconsistent with law or with this act, and may impose fines on the members, &c. (*a*). Those rules and alterations must be exhibited to the justices of the county at their quarter sessions, who are to annul them if repugnant to this act, and to confirm them if conformable to the meaning of the act. The rules, when confirmed, to be signed by the clerk of the peace, and deposited with him without fee. No society to be within the act till its rules have been confirmed (*b*). No confirmed rule to be altered or repealed unless at a general meeting of the society, to be convened by written notice signed by the secretary or clerk, on requisition by three members, and publicly read at the two usual preceding meetings of the society, unless a committee (under the regulations referred to near the conclusion of this article) have been named for the purpose, who are to be convened in the same manner, and unless the alteration have the consent of three-fourths of the members of the society or committee present at the time. The alterations of rules must, in order to be valid, be confirmed by the quarter sessions, and entered as the rules were (*c*).

The benefit of the act 33 George III. c. 54, above cited, is extended to all societies, though formed before that act, upon their at any time complying with its provisions (*d*).

Any friendly society, having exhibited its regulations at any quarter sessions for a peculiar jurisdiction, may exhibit them to the quarter sessions for the county, with a certificate or affidavit of such first exhibition; and such regulations being confirmed, are valid from the beginning (*e*).

The society may appoint officers at their general meetings, or by their committee. Securities to be given for offices of trust, with two sureties, if required by the rules. Treasurers or trustees to give bond to the clerk of the peace; and other persons to the treasurers or trustees. Bonds need not be stamped (*f*). Effects of the society vested in the treasurers or trustees for the time, who may bring and defend actions, &c. The society to declare the purpose of its establishment, &c. before confirmation of its rules by the quarter sessions (*g*).

If any member think himself aggrieved by any thing done, or omitted to be done by the society, or by their officers act-

(*a*) 33 Geo. III. c. 54, sect. 1.

(*d*) 40 Geo. III. c. 125, sect. 2.

(*f*) 33 Geo. III. c. 54, sect. 4.

(*b*) Sect. 2.

(*c*) 43 Geo. III. c. 111.

(*g*) Sect. 12.

(*e*) Sect. 3.

ing under them, any two justices of the peace of the county, &c. at or near the place where the society is established, on complaint on oath, or affirmation, by or for such person, may summon the principal officers of the society, or one of them, if the complaint be against the society collectively, and if the complaint be against any of the officers, may summon such officer to appear before such justices at a convenient time named in such summons, and may summon at the same time, if necessary, persons who may appear to have the custody of the rules of the society; and the justices, whether the party appear or not, upon proof, by oath or affirmation, of the summons being duly served, or left at the party's usual place of abode, are to try the matter in a summary way, according to the rules of the society; and their award is final (*a*). On complaint to two justices of the place in which the friendly society is held, by any member, of due relief having been refused, they may summon the officer complained on; and on his appearance or default, on oath of service, determine the complaint, and award proper relief, with costs not exceeding 10s.; and if those sums be not forthwith paid in presence of the justices, they are to award distress against the goods of the society, and failing them, those of the officer, leaving to the officer his recourse against the society; and as often as the sums directed by such order are unpaid, the justices are to award distress (*b*). Orders of justices, under the acts cited (*c*), for things done or omitted by the society, are to be made on the officers of the society, or any of them, in their proper name, and served personally, or at the officer's last or usual place of abode (*d*). The awards of justices are final (*e*).

Two justices of the place in which the friendly society is held, may, on complaint on oath, by any member of such society, of an offence against the rules by another member, summon such person; and on his appearance, or default, on oath of service of the summons, determine the matter, and make the proper order; and if they adjudge money to be paid by such person, and if he do not pay it forthwith on notice, they are to levy it by distress, with the costs of prosecution and distress (*f*). Their award is final (*g*).

It has been found that, under the acts 33 Geo. III. c. 54,

(*a*) 33 Geo. III. c. 54, sect. 15.

(*b*) 49 Geo. III. c. 125, sect. 3.

(*c*) 33 Geo. III. c. 54—49 Geo. III. c. 125.

(*d*) 49 Geo. III. c. 125, sect. 4.

(*e*) Sect. 5.

(*f*) Sect. 1.

(*g*) Sect. 5.



and 40 Geo. III. c. 125, cited, giving power to apply to justices of the peace, the jurisdiction of the judge ordinary is not excluded (*a*).

It seems proper just to mention the following provisions with regard to friendly societies, though not so immediately concerning justices. The society may appoint a committee, of not less than eleven, with all or any of the powers of the act cited; and five members of such committee are required to concur in any act of the committee. Powers of standing committees to be declared in the rules of the society, and of particular ones to be entered in a book. Committees controllable by society (*b*). Treasurers or trustees to lay out surplus of contributions with consent of the society (*c*), and to account for the proceeds to the society (*d*). Treasurers and all entrusted with funds, upon demand by the society or committee for the purpose, to give in accounts, pay balances, and transfer securities, to the person appointed; and, in case of failure, application may be made to the Court of Session, who will proceed summarily (*e*). No fee to be taken for any proceedings in such court; counsel to be assigned without fee; no stamp duty on proceedings (*f*). Executors, &c. to pay money due to societies before any other debts (*g*). Society may inflict penalty for misapplication of money. Society not dissoluble without the consent "of five-sixths of the then existing members of such society, and also of all persons then receiving, or entitled to receive relief." Stock not divisible except for the purposes of the society (*h*). Rules to be entered in a book, and received as evidence (*i*). Society may receive donations (*j*). Where general rules direct disputes to be settled by arbitration, the award of the arbiters to be final (*k*). The remaining sections of the act (*l*) regard settlements and removals, and are not applicable to Scotland.

Governors of institutions for relieving, by voluntary subscriptions and benefactions, widows, orphans, and families of the clergy, and others in distressed circumstances, may frame rules, and present them for confirmation as friendly societies, under the 33d George III. c. 54; the presentment being made before or immediately after Michaelmas sessions 1796 (*m*). Institutions, whose rules are so confirmed, may appoint trea-

(*a*) Bremner against Huntly Friendly Society, 4th December 1817.

(*b*) 33 Geo. III. c. 54, sect. 5.

(*c*) Sect. 6.

(*d*) Sect. 7.

(*e*) Sect. 8.

(*f*) Sect. 9.

(*g*) Sect. 10.

(*h*) Sect. 12.

(*i*) Sect. 13.

(*j*) Sect. 14.

(*k*) Sect. 16.

(*l*) Sect. 17—36.

(*m*) 35 Geo. III. c. 111, sect. 2.

surety, &c. and be entitled to the benefit of 33d George III. c. 54 (a).

See *Banks for Savings—Combination—Sedition*.

## GAME.

It is directed by the general statutes, that justices of the peace shall put the acts of Parliament to execution against “users of unlawful games with setting dogs,” “fowlers fowling” “in other men’s lands, makers of muirburn and mossburn;” and shall proceed by witnesses, or by the oath of party; and that the punishment shall be a pecuniary sum, answerable to the circumstances of the offence and the quality of the offender (b). It appears that, where the particular acts specify a sum, it is proper not to exceed it. (See *Process*, sect. Procedure on Complaint.)

There are several subsequent statutes on game, the execution of which is specially committed to justices.

Two witnesses are necessary in such cases, according to the ordinary rule, (see *Proof*, sect. Criminal Cases) unless otherwise specially provided by the particular statute founded upon.

In action for pecuniary penalties under the game laws, the complaint may be referred to the defender’s oath (c), if not otherwise specially provided. (See *Proof*, sect. Confession of Accused).

A person entitled to a share of the penalty (unless he renounce it) is an incompetent witness, on account of his interest. A member of an association for the preservation of game seems, for the same reason, to be an incompetent witness in a prosecution by the agent for the association.

### I. QUALIFICATION.

No man is entitled to “hunt or haulk” who has not “a plough of land in heritage” (in Scotland), under the pain of L.100 Scots, half to the King, half to the informer (d). This act is still in force, and applies to shooting (e); and is the

(a) 35 Geo. III. c. 111, sect. 3.

(b) 1617, c. 8; 1661, c. 38.

(c) Procurator-fiscal of Edinburgh against David Wilson, 27th June 1787.

(d) 1621, c. 31.

(e) Marquis of Tweeddale against Somner, 18th June 1808. In note to Earl Hopetoun against Wight, below.—Trotter against M’Ewan, 8th July 1809.—Earl of Hopetoun against Wight, 17th January 1810.

only qualification for hunting or killing game (*a*). The jurisdiction of justices of the peace in prosecutions upon this act has always been acknowledged in practice (*b*). The act contains no limitation in point of time for the prosecution. A qualified person may communicate the privilege of shooting over his grounds to a person not qualified (*c*); but the penalty applies, if the person (otherwise unqualified) having the privilege so communicated to him, shoot elsewhere than on the property of the person giving him the privilege. A tenant is not entitled to shoot on his farm without his landlord's permission (*d*). A lease successively renewable every 19 years at the demand of the tenant is not heritage in this question (*e*).

Every person not qualified to kill game in Scotland, who has in his custody, or carries at any time of the year, upon any pretence, any hares, partridges, pheasants, muirfowl, termagans, heathfowl, snipes, or quails, without leave of a person qualified to kill game in Scotland, forfeits for the first offence 20s. sterling, and for every subsequent offence 40s. sterling; and in case of not paying within ten days after conviction by a final judgment, is to be imprisoned "for six weeks for the first offence, and for three months for the second and every other subsequent offence" (*f*). A person not qualified, obtaining permission from a qualified person to shoot on his grounds, may of course lawfully have in his possession game killed by him on those grounds (*g*). Offences against this act (13th George III. c. 54) may be tried by the oath of one credible witness, or by the confession or oath of the accused, before any two justices of the peace, or the sheriff or steward, depute or substitute, of the county where the offence was committed, or where the offender is found, and may be prosecuted either by the procurator-fiscal, or by any other person who will inform and complain (*h*). It has been found that, under this act, prosecutions may be carried on by A B (designing him) "agent for the association for the preservation of game in the county of C;" without regard to the allegation (which was the fact) that the expence was defrayed by the association, and the penalties accounted for to them; which the Court were of opinion could not be inquired into, as he had a clear right in his own person to pro-

(*a*) Kelly against Smith, 27th June 1780.

(*b*) Hutcheson, ii. 639.

(*c*) Trotter, *supra*.

(*d*) Marquis of Tweeddale, *supra*.

(*e*) Earl of Hopetoun, *supra*.

(*f*) 13 Geo. III. c. 54, sect. 3.

(*g*) Trotter, *supra*.

(*h*) 13 Geo. III. c. 54, sect. 8.

scouts as a common informer (*a*). If any person convicted of any offence against this act do not pay the penalty decreed within 10 days, the justices, &c. may grant warrant for levying it by distress, or may grant warrant for committing the offender to gaol "for the time specified in this act," as satisfaction for the penalty, or till payment; and in case a warrant for distress be first obtained, and the penalty be not recovered, the justices, &c. who granted the warrant, upon its being certified to them by the officer executing the warrant, that the whole or a part remains unrecovered, may grant warrant for committing the offender to gaol as above (*b*). One half of the penalties is to be paid to the prosecutor, the other to the poor of the parish, or to repair the high-roads of the parish, within which the offence was committed, as the justices, &c. direct (*c*). Appeal is competent to the next Circuit Court of Justiciary, or (where there is no circuit) to the Court of Justiciary at Edinburgh, on entering it in open court when judgment is pronounced, or by lodging a copy of it within 10 days after judgment, with the clerk of the inferior court, and serving the opposite party, personally, or at his dwelling place, or his procurator or agent in the cause, with a duplicate of it: and such service is a sufficient summons to oblige the prosecutor to attend and answer at the next Circuit Court, to be held at least 15 days after service, or at the first Court of Justiciary to be held at Edinburgh, at least as long after service (*d*). It has been found that, under this act, although somewhat ambiguously expressed on the point, the prosecutor as well as the defender may appeal to the Court of Justiciary (*e*). When an appeal is taken, the appellant, at entering it, must lodge with the clerk of the court from which it is taken a bond, with a sufficient cautioner, for paying the sums in the decree and costs; and the clerk is answerable for the sufficiency of the cautioner (*f*). Prosecutions must be brought within six months after the offence (*g*).

## II. FORBIDDEN TIME.

Any person who wilfully takes, kills, destroys, carries, buys, sells, or has in his possession, or uses, any muirfowl or termagan, between 10th December and 12th August, or any heath-fowl between 10th December and 20th August, or any partridge between 1st February and 1st September, or any pheasant between

(*a*) Gray against Bonnar, 23d January 1816; Court of Justiciary; Fac. Col. App. No. 1.

(*b*) 13 Geo. III. c. 54, sect. 9.

(*c*) Sect. 10.

(*d*) Sect. 11.

(*e*) Gray, *supra*.

(*f*) 13 Geo. III. c. 54, sect. 12.

(*g*) Sect. 14.

1st February and 1st October, forfeits for every bird so taken, &c. L.5 sterling; and in case of not paying the sum decreed within ten days after conviction by a final sentence, is to be imprisoned two months for each L.5 (*a*). This act does not ex-

(*a*) 13 Geo. III. c. 54, sect. 1. This act, so far as regards the close time for Partridges, was repealed, and the time extended to 14th September, by 36 Geo. III. c. 54. But that act was repealed by 39 Geo. III. c. 34, sect. 1, in consequence of which the former act revived (*i. Blackstone*, 90.) Doubts have been entertained by some persons (*Hutcheson's*, J. P. 3d edit. ii. 550; *Ness on Game*, 118—128;) how far the penalty for breach of close time for partridges can now be levied in Scotland, on the ground that the act 39 Geo. III. c. 34, enacts that the penalty shall be the same as that in the English game act, 2 Geo. III. c. 19, to be levied as prescribed in that act, viz. in the courts of record at Westminster. But it appears that the penalty may still be levied under 13 Geo. III. c. 54. The English game act, 2 Geo. III. c. 19, among other things, appointed the close time for partridges in England to be from 12th February to 1st September, under a certain penalty. A subsequent English game act, 36 Geo. III. c. 39, extended the close time for partridges to 14th September. The Scots game act, 13 Geo. III. c. 54, among other things, appointed the close time for partridges in Scotland to be from 1st February to 1st September, under a certain penalty. The subsequent Scots game act, 36 Geo. III. c. 54, extended the close time for partridges to 14th September. The legislature, afterwards intending to appoint the close time in both countries to be from 1st February to 1st September, passed the act 39 Geo. III. c. 39. All that was necessary to accomplish this object in Scotland, was simply to repeal the Scots game act, 36 Geo. III. c. 54, by which the Scots game act, 13 Geo. III. c. 54, establishing that to be the close time, revived; but in England, besides repealing the English game act, 36 Geo. III. c. 39, it was necessary also to amend the English game act, 2 Geo. III. c. 19, thereby revived, as the close time there appointed did not commence at the same period as that now intended to be established. Accordingly, the preamble of the act 39 Geo. III. c. 34, has the following conclusion (which is almost *verbatim* copied as the title of the act:)  
 “Whereas it is expedient that the said acts, passed in the 36th year of the reign of his present Majesty, should be repealed, and that the said act of the second year of his present Majesty should be amended, so far as respects the time so therein limited within that part of Great Britain called England, by making other provisions for that purpose.” The first section then simply repeals the two acts of 36 Geo. III. This was sufficient for Scotland. But, in order to give a proper commencement to the close time in England, the second section repeals the 2d Geo. III. c. 19, as far as regards the close time for partridges; and the third section enacts, that no person shall take, &c. any partridge “within the kingdom of Great Britain” between 1st February and 1st September, and that any person transgressing shall be liable in the penalty of 2 Geo. III. c. 19, to be imposed, &c. as that act provides, viz. in the courts at Westminster. It appears therefore, upon a comprehensive view of the acts, to be the fair construction of them, as far as regards Scotland (as it was undoubtedly the intention of the Legislature) simply to revive the act 13 Geo. III. c. 54, with its penalty and its provisions for levying that penalty; and even upon a rigid and critical construction of the 3d section of 39 Geo. III. c. 34, (which contains an inaccurate description of the territory in which it was to operate) it appears that that section merely provides a course of procedure which cannot be followed in Scotland, and does not derogate from,

tend to any pheasant taken in the lawful season, and kept in a mew or breeding place (*a*). The procedure, &c. are the same as for an unqualified person having game without leave of a qualified person.

Those who kill hares or deer in time of snow forfeit L.100 Scots for each offence; half to the King, half to the informer (*b*). The procedure, &c. are described in the general observations at the beginning of this article (*c*).

### III. TRESPASSING.

Justices of the peace are directed to put the laws to execution against fowlers fowling in other men's lands, as was noticed at the beginning of this article; and the procedure, &c. are there described.

Hunting (which expression comprehends shooting) (*d*) and hawking in neighbour's corn from Easter till it be shorn; travelling through wheat at any time of the year; and hunting in woods, parks, hainings within dikes, or broom, without leave of the owner, are unlawful, and subject the person guilty, not only to damages to the owner, but to a penalty of L.10 Scots to the public for the first fault; L.20 for the second; and forfeiture of moveables (under which the justices seem authorized to inflict a suitable pecuniary penalty) for the third (*e*). (See *Planting and Enclosing*.)

A qualified person cannot, without leave, hunt or shoot on the ground of another, though not qualified, and though the ground be uninclosed and waste (*f*). Perhaps the preceding penalties hardly apply where the ground is in that state; but the proprietor may obtain damages and an interdict from the Judge Ordinary, or may obtain damages from the justices under the small debt act; and if the person offending be a "common fowler," he becomes liable to certain penalties on that ground, as after mentioned.

The tenant cannot prevent his landlord, or those who have

or repeal the competent course of procedure which the 1st section, by reviving the act 13 Geo. III. c. 54, had virtually and by necessary operation established.

(*a*) 13 Geo. III. c. 54, sect. 2.

(*b*) 1621, c. 32—1685, c. 20.

(*c*) There seems to be no legal authority for any farther limitation as to the time for taking hares, although a farther limitation as to the time for hare hunting is inserted in some of the almanacks. The act 1707, c. 13, in so far as it prohibits the shooting of hares, is repealed by 48 Geo. III. c. 94.

(*d*) Trotter, *supra*.

(*e*) 1555, c. 51.—1685, c. 20.—Marquis of Tweeddale against Hugh Dalrymple, 3d March 1778.

(*f*) Earl of Breadalbane against Livingstone, 16th June 1790, affirmed on appeal.

the landlord's permission, from hunting on the farm, provided they do not injure the fences, or the sown land, or the industrial crop standing; and only pass through pasture ground, lea land, or stubble, which are not liable to be injured by persons passing through them. Where injury is actually done, the tenant is entitled to have compensation for it (*a*).

A servitude of pasturage does not include a right of killing game on the servient tenement, even though the proprietor of the dominant tenement be otherwise qualified (*b*).

Foxes (it may be mentioned here, though they are not game) may be pursued, for extirpation, by farmers, &c. without the owner's leave, only paying actual damage (*c*); but they cannot be followed by sportsmen for amusement without the owner's leave (*d*).

If a common fowler hunt (which comprehends shooting) on any grounds without a subscribed warrant from the proprietor, he forfeits L.20 Scots for each offence, half to the discoverer, half at the disposal of the judge, and forfeits his dogs, guns, and nets, to the discoverer, by sentence of the judge; and if any common fowler be found in any place with guns or nets, having no licence from any nobleman or heritor, he may be sent abroad as a recruit (*e*). The execution of this act is committed to justices of peace, sheriffs, and bailies of burghs. It is understood that the latter part of the enactment, authorizing the sending the person abroad as a recruit, has for a long time been very rarely acted upon. The term *common fowler*, seems to signify in general an unqualified person who makes a practice of killing and selling game (*f*).

There is a penalty against officers hunting or shooting without leave of the proprietor; for which see *Soldiers*, sect. Game.

The proprietor is not entitled to seize the gun of any person trespassing (*g*). The guns, dogs, and nets of common fowlers trespassing, are indeed forfeited; but it is by an action at law, as just mentioned. It is murder, however, to kill in defence of a gun, which another advances to seize, from an erroneous idea of his right to do so (*h*).

If any person, having entered any open or inclosed ground with intent illegally to take or gill game or rabbits, or to assist

(*a*) Ronaldson against Ballantyne, Nov. 21. 1804.

(*b*) Forbes against Anderson, Feb. 1. 1809.

(*c*) Colquhoun against Buchanan, 6th August 1785.

(*d*) Marquis of Tweeddale against Hugh Dalrymple, 3d March 1778.

(*e*) 1707, c. 13.

(*f*) Boyd, i. 272.

(*g*) Gregory against Wemyss, 23d January 1753.

(*h*) Mungo Campbell, December 1769, M'Laurin's Criminal Cases.

in doing so, be found at night, that is, between six o'clock in the evening and seven in the morning from 1st October to 1st February, between seven evening and five morning from 1st February to 1st April, and between nine evening and four morning for the remainder of the year, armed with gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, he may be transported for seven years, or may receive such other punishment as may by law be inflicted on persons guilty of a misdemeanour (*a*).

The owners or occupiers of such ground, their keepers, servants, or any other persons, may apprehend such offenders and deliver them to a peace officer, who is to take them before a justice of the peace for the place where the offence is committed; and if they be not apprehended, any such justice, upon oath of a credible witness, is to grant warrant for apprehending them; and if upon their apprehension it appear on the oath of a credible witness that they have been guilty, the justice is to admit them to bail; and if they cannot find it, to commit them to jail, to be dealt with according to law (*b*). (*See Arrest, &c.—Commitment—Bail*).

If any person unlawfully enter or be found in any ground during night, as it is before described, having any net, engine, or other instrument for taking or killing game, or if he take or kill game, he may be apprehended by any of the persons before mentioned, and delivered to a peace officer, who is to carry him before a justice for the place of the offence, to be dealt with according to law (*c*). The proper course for a justice in Scotland to follow in such a case, if there appear to be any evidence of the fact, seems to be to take a written declaration from the person apprehended, and to admit him to bail, (*see Arrest, &c.—Bail*) and at the same time to take a short memorandum of the evidence, with a view to his trial.

All game, though caught in breach of the acts above quoted, belongs to the person catching; unless the confiscation of it make part of the statutory penalty (*d*).

(*a*) 57 Geo. III. c. 90, sect. 1.

(*b*) Sect. 2.

(*c*) Sect. 3.

(*d*) Erskine, II. 1. 10.

Before a person can use any means for taking or killing game, he must (as every one knows) pay a certain annual (assessed) tax or licence duty. But as this matter concerns the commissioners of taxes, and Court of Exchequer, before whom the forfeitures are levied, and not the justices, and as it undergoes frequent alterations, it is sufficient to mention here, that the obtaining a licence does not authorise any person to shoot, &c. without qualification, or at forbidden times, or to trespass.

The buying and selling of game was prohibited by the Scots acts 1600, c. 23, and 1621, c. 30, under a penalty; and those acts having fallen into desuetude, their provisions were revived by 1685, c. 20, but only for



With regard to setting spring-guns or other lethal engines, such as man traps or the like, calculated to kill or to inflict grievous bodily injury, in order to prevent persons in search of game, or others, from trespassing, it has been unanimously decided by the Court of Justiciary, in a case where a person trespassing, who was alleged to be in search of game, had been killed by a spring-gun, that the person who set the gun was relevantly indicted for murder, although it had been set in an enclosed plantation, and after intimation to the public that spring-guns had been set. And the Court proceeded upon the principle that a person trespassing in search of game, even at night, and armed, could not legally, or without the guilt of murder, have been shot directly by the proprietor or his servants, although persisting (without personal violence to the proprietor or his servants) to trespass, after direct and reiterated warning given personally at the moment; and that the same thing can as little, without the guilt of murder, be done indirectly, through the medium of a spring-gun set to kill any person disregarding such notice: that the plea that there could be no intention or contemplation of killing on the part of the setter of the spring-gun giving notice, because he was warranted to believe that no person, after the notice, would trespass so as to be shot, was not well founded, since it was obvious and well known that the notice could, and did produce no such effect, and, therefore, the setter of the spring-gun must have contemplated the likelihood of some person coming to it, and must have intended that, in case that happened, such person should be killed or grievously wounded: that, besides the known tendency of mankind to disregard such threats, the notice was evidently of a very imperfect kind: and that, farther, such engines may injure or kill, not only poachers, who, though criminal, are not punishable with death, but persons who are not in search of game, and who may be trespassing from ignorance, childishness, or inattention, or from a lawful cause, or who may have right to be on the ground (*a*). The same principles, of course, would apply in the case of an injury less than death inflicted by such an engine. And, in the case which has just been referred to, the Judges of the Court of

seven years. It has also been prohibited by certain statutes passed since the Union (see statutes at large, Index) the last of which is 58 Geo. III. c. 75; but it appears that none of those statutes extend to Scotland. In almost all cases, however, in which game is bought and sold, a breach of the regulations noticed in the text is committed, particularly of those with regard to qualification, and sometimes of those with regard to close time.

(*a*) Case of John Craw, gamekeeper to the Earl of Home, decided by the Court of Justiciary upon printed informations, 18th June 1827.

Justiciary concurred in opinion that the setting of such engines was an unlawful act, independently of any person being injured by them; and some of the judges took occasion to state that it would be interdicted by the sheriff of the county upon an application by the procurator-fiscal to whose knowledge it might come, or even perhaps upon an application by a neighbour, who might show that the safety of his children, or his dependants, would be endangered in case they should happen heedlessly to trespass. And, although the judges considered that a proprietor was entitled to keep out intruders by putting spikes or glass, or the like, upon his wall, they seemed to consider that, if a person trespassing were injured by spikes or other instruments or devices for that purpose, insidiously concealed or disguised within the inclosures, the person who was the occasion of such injury would be punishable (a).

See *Planting and Enclosing*.

#### IV. MUIRBURN.

For the sake of the game, the making of muirburn, or setting fire to any heath or muir, from 11th April to 1st November, is prohibited. Any person who does so, forfeits L.2 sterling for the first offence, L.5 for the second, and L.10 for every subsequent offence; and in case of not paying, within ten days after conviction by a final judgment, suffers imprisonment for six weeks for the first offence, two months for the second, and three months for every subsequent offence (b).

The occupier of the ground upon which muirburn is discovered within the forbidden time, is deemed guilty of the offence, and is liable to the penalties, unless he prove that the fire was communicated from some neighbouring ground, or was raised by some other person not in his family (c).

But every proprietor of high and wet muir grounds, the heath upon which frequently cannot be burnt so early as 11th April, may, when such lands are in his own occupation, burn the heath upon them at any time between 11th and 25th April, without incurring any of the penalties mentioned; and when such lands are let, the proprietor, or his factor, may, by a writing, authorise his tenants in such lands to burn the heath upon them any time between 11th and 25th April, without incurring any of those penalties (d); provided the writing

(a) An act of Parliament has been passed, 7 and 8 Geo. IV. c. 18, "to prohibit the setting of spring-guns, man-traps, and other engines calculated to destroy human life, or inflict grievous bodily harm." But it is declared not to extend to Scotland.

(b) 13 Geo. III. c. 54, sect. 4.

(c) Sect. 5.

(d) Sect. 6.

authorizing the burning be previously recorded in the sheriff or steward court books of the county in which the lands lie, upon paying the usual fees (*a*).

The penalties are recoverable in the same way, and are in the same situation, as to disposal, appeal, and every other particular, as those against possessing muirfowl, &c. unlawfully, which are contained in the same act of Parliament, and have been already mentioned.

For the form of the procedure for offences against the game laws, see *Process*.

## GAMING.

PLAYING at cards and dice in any public-house is prohibited under the penalty of £40 Scots from the keeper of the house for the first fault, and loss of his liberties for the second; and playing in a private house, unless the master play, is also prohibited (*b*). But it hardly appears that justices of the peace have the execution of this enactment specially imposed upon them. It may, however, be a good reason for their refusing to renew an ale licence, that the applicant countenances gaming in his house.

To discourage excessive play, it is enacted, that “if it shall happen any man to winne any summes of money at carding or dycing, attour (above) the summe of an hundreth merks (L.5. 11s. 1½d. sterling) within the space of twenty-four hours, or to gain at wagers upon horse races any summe attour the said summe of an hundreth merks, the superplus shall be consigned within twenty-four hours thereafter in the hands of the treasurer of the kirk, if it be in Edinburgh; or in the hands of such of the kirk-session in the country parochines as collects and distributes money for the poor of the same; to be employed always upon the poor of the paroche where such winning shall happen to fall out.” And “full power and commission” is given “to the bailies and magistrates of burrowes, the sheriffs and justices of peace in the country, to pursue and conveen all such persons for all winning at cards, dice, and horse races which shall happen to be made by any person by and attour

(*a*) 13 Geo. III. c. 54, sect. 7.

(*b*) 1621, c. 14.

"the said summe of an hundreth merks money foresaid; and  
 "in case the magistrate informed thereof refuse to pursue for  
 "the same, the party informer shall have action against the  
 "said magistrate for double the like summe; the one half  
 "whereof to be given to the poor, and the other halfe to the  
 "party informer" (*a*). This act was found in 1774 and in  
 1775 to be in observance (*b*). The kirk-treasurer has been  
 found to be a competent pursuer (*c*). In a horse race, the  
 parish, where the wager was laid, is entitled to the surplus  
 above 100 merks (*d*).

All obligations are declared to be null and void where any  
 part of the consideration is money, or other valuable thing, won  
 by gaming in any way, or betting at any game, or which are  
 for the re-payment of money knowingly lent for such gaming  
 or betting, or lent, at the time of such playing or betting, to  
 any person who plays or bets (*e*). It has been found that  
 this objection may be pleaded against an onerous assignee or  
 arrester of a bill granted for a game debt (and the same must  
 hold of bonds or other obligations) and that it may be proved  
 by the oath of the winner (*f*). It has been found that this  
 objection cannot be pleaded against a *bona fide* onerous indor-  
 see of a bill (*g*). But a contrary decision was given in one  
 reported case (*h*); a contrary opinion is held by great authori-  
 ties; a contrary course of practice is followed in England (*i*);  
 and the contrary is said to have been found in some recent  
 cases not reported (*j*).

If any person, by any fraud in playing at cards, dice, or any  
 games, or in bearing a part in the stakes, or in betting, wins  
 any money or other valuable thing, or at any one sitting wins

(*a*) 1621, c. 14.

(*b*) Maxwell against Blair, 14th July 1774—Kirk-session of Dumfries  
 against Kirk-sessions of Kirkcudbright and Kelton, 16th June 1775.

(*c*) Grant against Sir Andrew Ramsay, 9th February 1711; Fount.;  
 Mor. Poor.

(*d*) Kirk-session of Dumfries, *supra*.

(*e*) 9 Anne, c. 14, sect. 1.

(*f*) Pringle against Biggar, 7th November 1740; C. Home; Elchies,  
*Post. Illu.*

(*g*) Nelson against Bruce, 25th January 1740, Kilk. p. 70; C. Home;  
 Elchies, *ib.*—Clerk against Stewart, 18th February 1741, Kilk. p. 70; re-  
 ported in Stewart against Hyalop, C. Home, p. 271; Elchies, *ib.*—Mac-  
 kenzie against Hamilton, 24th July 1745, Elchies, *ib.*—Bell's Com. 3d  
 edit. ii. 210.

(*h*) Pringle against Campbell, 9th February 1731; Dict. ii. 236; but  
 that decision was reclaimed against, and the case (according to a marking  
 by Lord Kames on the printed papers) was taken out of Court by transac-  
 tion.

(*i*) See Bell's Com. 3d edit. ii. 210.

(*j*) Mor. Dict. Bill, ii. 2. p. 1509, in Note to Nelson against Bruce, 25th  
 January 1740.

above L.10, every person so winning, and being convicted upon an indictment or information, forfeits five times the value of the money, or other thing won, to any person who will sue for it, and is to be deemed infamous, and to suffer such corporal punishment as in cases of wilful perjury (*a*). Prosecution for the corporal pains and infamy seems not competent before the justices, but before the Judge Ordinary. Prosecution for the pecuniary penalty (if it be ever separated from the other, and if the amount should not exceed L.5) is perhaps competent before the justices under the Small Debt Act. (See *Usury*).

Any two justices of the peace may cause to be brought before them any person whom they have just cause to suspect to have no visible estate or calling by which to maintain himself, but for the most part to support himself by gaming; and if such person do not make it appear that the principal part of his expences is not maintained by gaming, the justices are to require of him securities for his good behaviour for twelve months; and, in default of his finding such securities, are to commit him to the common gaol till he find such (*b*). If, during the time for which he is so bound to good behaviour, he at any one time play or bett for any thing exceeding in whole L.1 in value, such playing is to be considered a breach of behaviour (*c*).

If any person assault and beat, or challenge or provoke to fight, any other person upon account of money won by gaming or betting, on conviction upon indictment or information, he forfeits to the King all his goods, and is to be imprisoned for two years (*d*). This, of course, is an offence for which, when prosecuted under the act cited, justices of the peace cannot *try*, the punishment being so severe; but may *proceed*. Their best course seems to be to transfer any case of

(*a*) 9 Anne, c. 14, sect. 5.

(*b*) Sect. 6.

(*c*) Sect. 7.

(*d*) 9 Anne, c. 14, sect. 8. There are several British acts with regard to gaming, which some have thought might extend to Scotland. But 30 Geo. II. c. 24, has been found by the Court of Justiciary not to extend to Scotland (Hume, i. 169). And the same seems true of the others, 9 Anne, c. 6, sect. 56; 10 Anne, c. 28, sect. 109; 8 Geo. I. c. 2, sect. 36; 12 Geo. II. c. 28; 13 Geo. II. c. 19, sect. 9, 10; 18 Geo. II. c. 34; 42 Geo. III. c. 119; from the whole strain of them, from Lord Swinton's doubts as to the two first, the only ones he mentions, and from Lord Kames's opinion with regard to all of them (except 18 Geo. II. which he mentions as a joint authority for certain of the provisions of 9 Anne, c. 14, and except the last, of course passed long after his death) implied by his passing them in silence.

Prosecutions for gaming rarely occurring, it was thought improper to increase the bulk of the treatise by giving forms for them. Forms can easily be framed from those given for other cases.

this description to the sheriff (see *Arrest*, &c.) except where the offence is a minor breach of the peace, such as it is proper for them to take cognisance of at common law.

By the common law, no action is competent for any sum gained by betting or wagering in any form (*a*). (See *Small Debt Act*, sect. Causes Competent).

See *Lotteries*.

## GUNPOWDER.

SOME provisions have been made by 12 Geo. III. c. 61, for preventing danger from large quantities of gunpowder.

A great part of the act regards the manufacture. Certain penalties and forfeitures, to be judged of by two justices, are appointed for certain cases; and the quarter-sessions have certain powers with regard to the erection of mills, &c. But as the manufacture is carried on in very few places in Scotland, it is sufficient on this head to refer to the act.

The other parts of the act are of more general application.

No dealer can keep more than 200 lb. and no other person more than 50 lb. in any building or place occupied by the same person or persons (all buildings and places adjoining to each other, and occupied together, being deemed one house or place), or on any river or other water (except in carriages loading or unloading, or passing on the land, or in ships, boats, or vessels, loading or unloading, or passing on the water, or detained there by the tide or bad weather), otherwise than in mills and other places allotted for that purpose under the act (which cannot be within a mile of any city, borough, or market town, or two miles of any palace or residence of the king, queen consort, or dowager, or of a king's magazine, or half a mile of any parish church, otherwise the same penalties attach), on pain of forfeiting the gunpowder beyond the quantity allowed to be kept, and the barrels containing it, and 2s. for every pound of gunpowder beyond the allowed quantity (*b*).

300 lb. may be kept for the use of any mine or colliery, in any magazine within 200 yards of the mine or colliery, and

(*a*) Bruce against Ross, 26th January 1787.—Wordsworth against Pettygrewe, 16th May 1799.—Cumming Gordon against Campbell, 16th November 1804.

(*b*) 12 Geo. III. c. 61, sect. 11.

not within the distance from towns, churches, &c. before described (*a*).

No person can convey at one time more than 25 barrels in any carriage by land, or more than 200 barrels in any vessel by water (except in vessels with gunpowder from or to any place beyond sea, or going coastwise); and all gunpowder conveyed on land or water (except in such vessels for importation or exportation, or going coastwise) must be in barrels close joined and hooped, without any iron about them, and so secured that no part of the gunpowder be scattered in the passage; and each barrel must contain no more than 100 lb. of gunpowder; and, when conveyed by land, must be entirely enclosed in a leathern bag, or a bag commonly called a *saltpetre bag*; and every carriage in which gunpowder is conveyed by land must have a complete covering of wood, painted cloth, tarpaulin, or wadmill tilts, over all the gunpowder. And no gunpowder can be conveyed in any vessel by water (except in vessels with gunpowder exported or imported, or going coastwise) that has not a close deck; and as soon as any gunpowder is put on board such vessel, it must be covered with raw hides or tarpaulins; and all gunpowder carried (except in vessels for exportation or importation, or going coastwise) in greater quantity, or otherwise than before prescribed, and the barrels containing it may be seized by any person, who has the same authority to remove such gunpowder and barrels, and to use for that purpose, during 24 hours after seizure, the carriage or vessel in which it is seized, and the tackling, beasts, and accoutrements belonging to it, on paying a recompence for the use of it, and to detain such gunpowder and barrels, as is afterwards given to a person searching under the warrant of a justice of the peace; and such seizure is for his own use, on conviction of the offender (*b*).

When returned gunpowder is to be landed, no other gunpowder is to be brought to the wharf, or other place, to be loaded in its stead, to a greater quantity than has been carried away of the returned powder, till the whole be carried away, on forfeiture of all gunpowder brought to the place, or loaded otherwise (*c*).

If any person on board any vessel loaded with gunpowder (except vessels carrying powder from or to foreign parts or coastwise) bring, have, or use on board, any charcoal or other combustible matter, or any fire or lighted candle, or if he smoke, he forfeits L.5; and the person having the care of

(*a*) 12 Geo. III. c. 61, sect. 12.

(*b*) Sect. 18.

(*c*) Sect. 19.

such vessel, and willingly permitting such things, or doing them himself, also forfeits L.5 (*a*).

No person having the care of any carriage for conveying gunpowder by land can, after beginning to load gunpowder into it, or to unload such out of it, stop at any place of loading, or, in the loading or unloading, suffer longer time to elapse than indispensibly necessary; and no person having the care of any vessel for conveying gunpowder by water (except from or to places beyond sea, or going coastwise) can, after beginning to load or unload any quantity of gunpowder, stop at any place of loading, or, in the loading or unloading, suffer longer time to elapse than indispensibly necessary, not exceeding 18 hours, unless hindered by the weather; and every such vessel (except as above) having completed her loading, must depart from her place of loading, on her course, the first ensuing tide, unless hindered by stress of weather or other just impediment; all under the penalty of L.10 (*b*).

None of those provisions for the conveyance of gunpowder, or the loading or unloading of it, extend to any carriage or vessel conveying a quantity not exceeding 100 lb. weight (*c*).

Any justice of the peace of any county or other division, in which gunpowder is suspected to be made, kept, or carried, contrary to this act, on demand made, and a reasonable cause assigned on oath by any person, must issue a warrant for searching in the day-time any place, carriage, or vessel, for such gunpowder; which, when found, is, with the barrels, to be immediately seized by the searcher or searchers, who must, with all convenient speed, remove it and the barrels to such proper places, under the restrictions of this act, as they think fit; and, if such gunpowder be seized in any carriage or vessel, may use for removing it, during 24 hours after seizure, such carriage or vessel, with its beasts or accoutrements (paying to the owner a recompence, to be settled by the justices before whom the complaint is made after seizure, to be recovered by distress and sale, as afterwards directed concerning pecuniary penalties) and may detain such gunpowder and barrels till it be adjudged, on a hearing before two justices, whether the same be forfeited; and the searcher or seizer is not liable to any suit for such detainer, or for any loss or damage which may happen to the gunpowder or barrels, other than by the wilful acts or neglect of them, or the persons with whom they entrust

(*a*) 12 Geo. III. c. 61, sect. 20.

(*b*) Sect. 21.—The provision in this section, that gunpowder should not be carried by land or water along with any other lading, is repealed by 54 Geo. III. c. 152.

(*c*) Sect. 22.



the keeping of them (*a*). But gunpowder seized under the authority of justices, &c. may be seized again, if not then lodged in the situations of safety above described (*b*).

Penalties and forfeitures under this act are recoverable before two justices of the peace for the county, or other division, in which the offence is committed, on oath of one witness, or confession, half to the King, and half to the informer prosecuting. Where the penalty is pecuniary, it is to be levied by distress and sale, by warrant of such justices, with the expences. In default of distress, the offender is to be sent by such justices to the house of correction to hard labour, not exceeding six months, nor less than three (*c*).

Prosecutions must be commenced within 14 days after seizure, or after commission of the offence, where there is no seizure (*d*).

This act does not extend to any buildings erected, or to be erected, for making gunpowder, in any lands belonging to the King; or to keeping gunpowder at any magazine belonging to the King; or to hinder the trial of gunpowder by the King's officers, as usual, for the service of the King; or to the carriage of gunpowder to or from the King's magazines, under a special and express order of the Board of Ordnance, containing the quantity of gunpowder to be carried, and the time for which the order is to be in force; or to the carriage of gunpowder with forces on their march, or with the militia during their annual exercise, or which is sent for the use of such forces or militia (*e*).

Former acts are repealed (*f*).

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## HAMESUCKEN.

HAMESUCKEN is "the felonious seeking and invasion of a person in his dwelling-place or house;" not a shop or booth; nor an inn where he is living for a time; nor a friend's house where he is on a short visit, he having another home. It comprehends an attack, not on the master only, but on any members of the household, who are there at bed and board as their

(*a*) 12 Geo. III. c. 61, sect. 23.

(*b*) Paterson and Irvine against Gillespie, 10th March 1809.

(*c*) 12 Geo. III. c. 61, sect. 26.

(*e*) Sect. 29.

(*d*) Sect. 27.

(*f*) Sect. 31.

home. The attack must be made in the house ; or, if the greater part of the injury have been done without the house, the attack must have been commenced within ; but there is no necessity that the assailants have entered with their persons ; it is sufficient, for instance, that they have shot the person through the window. If the entry have been made with the felonious purpose of attacking the person, there is no occasion for its having been accompanied with force of any kind. The entry must have been made with the intent to commit this felony, and of malice aforethought ; so that an outrage upon a sudden quarrel within the house, or instantly pursuing the person into his house in prosecution of a quarrel begun without, is not hamesucken. The sufferer must either have been violently beaten in his person, or have had some other injury done him, by constraint of his person, or alarm for its safety. This crime is capital, but not necessarily so ; it is now commonly punished arbitrarily (a).

Justices may arrest for this offence (see *Arrest, &c.*) ; but they cannot try for it.

See *Injuries Real*.—*Crime in general*, sect. Wrongful act necessary.

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## HAWKERS AND PEDLARS.

### I. REGULATIONS AND PENALTIES.

*To whom they extend.*—The regulations and penalties in this article extend to “ every hawker, pedlar, petty chapman, “ or other person who goes from place to place, or to other “ men’s houses, travelling on foot, or with any horse or horses, “ or otherwise, in Scotland, carrying to sell, or exposing to “ sale, any goods, wares, or merchandize ; or who opens an occasional room or shop, and exposes to sale, by retail, any “ goods, wares, or merchandize, in any town, parish, or place, “ such person not being a householder there, or the same not “ being the usual place of his or her abode ; or who, by any “ means or device, vends or sells, either by himself or herself, “ or by any auctioneer, whether licensed or not, broker, appraiser, agent, servant, or other person, on his or her behalf, “ any goods, wares, or merchandize whatsoever, by any mode

(a) Hume, l. 307–317.

" of sale at auction whatsoever, or whereby the best and highest bidder is or shall be deemed to be the purchaser" (a).

But none of those regulations extend to hinder any person from " selling or exposing to sale any sorts of goods or merchandize in any public fair or market legally established, and " held within Scotland," as before they were enacted (b). Nor do they extend to prohibit any person from " selling, within " 20 miles of his or her usual place of residence, any printed " papers licensed by authority, or any fish, fruit, or victuals ; " nor to hinder the real worker or workers, or maker or makers " of any goods, wares, or manufactures of Great Britain, or " his, her, or their children, apprentices, or known agents or " servants, usually residing with such real workers or makers " only, from carrying abroad or exposing to sale, and selling " by retail or otherwise, any of the said goods, wares, or manufactures, of his, her, or their own making, in any mart, market, or fair, and in any city and market town" (c).

*Procuring Licence.*—Every person to whom the regulations extend must take out a licence on 1st August annually, which continues in force for a year, for which he pays L.4, " for " every such person travelling on foot," and L.4 " for every " horse, ass, mule, or other beast bearing or drawing burthen, " any such person shall travel with" (d).

The person applying for a licence must produce a certificate of character and fitness from the minister and two reputable householders of the parish of his residence, in this form.

" We *A B*, the minister, and *C D* and *E F*, being two householders residing at \_\_\_\_\_, in the parish of \_\_\_\_\_, in the county of \_\_\_\_\_, do hereby certify, that *G H* hath been known to us for the space of \_\_\_\_\_ years last past, and during all that time hath usually resided in the said parish" [or otherwise, as the case may be] " and is a person of good character and reputation, and is a fit person to be licenced to exercise the trade of a hawker, pedlar, and petty chapman. Dated the \_\_\_\_\_ day of \_\_\_\_\_

" *A B*, Minister.

" *C D*, }  
" *E F*, } Householders." (e)

The Lord Provost of the city of Edinburgh, the sheriffs-depute and substitute of the county of Edinburgh, the sheriff-depute of the county of Haddington, and the sheriff depute of

(a) 55 Geo. III. c. 71, sect. 1, 6.

(c) Sect. 16.

(d) Sect. 3.

(b) Sect. 15.

(e) Sect. 4.

the county of Lindlithgow, are appointed commissioners for granting licences (*a*).

The clerk of the commissioners receives the certificates and issues the licences, and transmits the money arising from the licences to the receiver-general, retaining an allowance for trouble and expence, fixed by the commissioners (*b*).

A person trading within the regulations, without having procured a licence, forfeits L.25 for each offence (*c*).

*Marking on packages, &c.*—Every person receiving and trading under such licence, must “cause to be written, painted, “or printed, in large legible Roman capitals, upon the most “conspicuous part of every pack, box, bag, trunk, case, cart, “or waggon, or other vehicle or conveyance in which he or “she shall carry his or her goods, wares, and merchandise, “and of every room and shop in which he or she shall so trade, “and likewise upon every hand-bill or advertisement which he “or she shall give out, distribute, or publish, the words ‘**LICENCED HAWKER**,’ together with the number, name, or “other mark or marks of distinction,” upon his licence; otherwise he forfeits L.10 for every offence (*d*).

Any person not licensed, using the words “**Licensed Hawker**,” or “**Licensed Pedlar**,” or words to such effect, on “any pack, bag, box, trunk, case, cart, waggon, or other “vehicle or conveyance for any goods, wares, or merchandise, “or in any room or shop in which he or she shall sell or expose to sale, or keep for sale, any goods, wares, or merchandise,” forfeits L.10 for every offence (*e*).

*Dealing in goods smuggled, fraudulently procured, &c.*—Any such licensed person convicted of knowingly dealing in, or selling any kind of goods smuggled or prohibited, or fraudulently or dishonestly procured, either by himself or others with his knowledge, forfeits his licence, and is incapable of receiving a new one, besides being subject to the legal punishments for such offences (*f*).

*Trading without carrying the licence obtained, or contrary to it. Shewing licence.*—Any such hawker, &c. or other trading person, so travelling, trading “without, or contrary to, or otherwise than as shall be allowed by such licence,” forfeits L.10 for every offence. And if any person trading under a licence, upon demand “by any person or persons authorized or appointed to demand any such licence by the commissioners appointed by this act, or any two of them, under their hands, “and upon producing or shewing such authority or appoint-

(*a*) 55 Geo. III. c. 71, sect. 2.

(*b*) Sect. 5.

(*c*) Sect. 6.

(*d*) Sect. 7.

(*e*) Sect. 8.

(*f*) Sect. 9.

“ment to such person so trading, as last aforesaid, or upon  
 “demand made by any sheriff or steward-depute or substitute,  
 “justice of the peace, provost, constable, or other officer of  
 “the peace of any county, stewartry, burgh, or place, where  
 “he or she shall so trade, or by any officer of the customs or  
 “excise, or by any person to whom such hawker, pedlar, or  
 “petty chapman, shall offer any goods to sale, shall refuse to  
 “produce and shew his or her licence for so trading as afore-  
 “said, or shall not have his or her licence ready to produce and  
 “shew unto such person authorized or appointed, as last afore-  
 “said, or unto such sheriff, steward, justice of the peace, pro-  
 “vost, bailie, constable, or other officer of the customs or ex-  
 “cise,” he forfeits L.10 ; and, for non-payment, is to be treated  
 as a common vagrant, and to be committed to the nearest gaol  
 or house of correction (a). (See *Vagabond*.)

*Forging or using forged licence.*—If any person whatever  
 forge a licence, or travel with, or shew such forged licence, as  
 authorizing him to trade under this act, he forfeits L.300 ; or  
 is to be punished according to law, as guilty of forgery, or  
 knowingly using forged writings (b).

*Hiring, letting, &c. licence.*—If any person “let out, hire,  
 “or lend” a licence granted to him, or trade under a licence  
 granted to any other person, or under a licence not in his own  
 real name, he forfeits L.25 for each offence ; and if any person  
 be convicted of “lending” his licence, he forfeits it, and is  
 disqualified from receiving another (c).

## II. RECOVERING PENALTIES, &c.

Pecuniary penalties exceeding L.25 are to be recovered,  
 with expences, in Exchequer, half to the King, half to the per-  
 son who shall inform or sue for the same (d).

Pecuniary penalties, not exceeding L.25, are recoverable be-  
 fore the sheriff or steward-depute or substitute, or a justice of  
 the peace of the place of the offence, on proof by confession,  
 or by the oath of one witness, half to the King, half to the in-  
 former prosecuting for them ; and, on non-payment, the judge  
 is to grant warrant for levying them by poinding and sale of  
 the offender's goods, or of the goods with which he is trading,  
 returning the overplus to the owner, after paying the penalty  
 and the expence of poinding and sale ; and is to commit the  
 offender to the prison of the place till the penalty and charges  
 of poinding and sale be levied, or paid or satisfied ; and any

(a) 55 Geo. III. c. 71, sect. 10.

(b) Sect. 11.

(c) Sect. 12.

(d) Sect. 17.

such sheriff, steward, or justice of the peace, may, by his warrant, cause such offender to be apprehended and brought before him, to answer to any charge for any such penalty; and may commit the offender to the prison of the place, till the hearing of such charge, unless he enter into a bond before such judge, with two sufficient sureties in a sufficient sum, to be ordered by the judge, to appear at the hearing of such charge (*a*). (See *Bail*.)

Any person may seize and detain any such hawker, pedlar, petty chapman, or other trading person as aforesaid, travelling or trading without a licence, contrary to this act, or refusing or neglecting to produce a proper licence to such person, for a reasonable time, in order to give notice to a constable or other peace officer, who is to carry such hawker, &c. unless, in the meantime, he produce his licence, before the sheriff or steward-depute or substitute, or a justice of the peace of the place of the offence, who is to examine into the fact; and upon proof by confession, or oath of one credible witness, of such trading, and no licence being produced before such judge, is to convict the offender, and to grant warrant for levying the L.25 by poinding and sale of the goods of such offender, or of the goods with which he shall be found trading, rendering the overplus to the owner, after deducting the reasonable charges of poinding and sale, and the penalties; and, in the meantime, is to commit the offender to the common gaol or house of correction of the place of the offence, till the penalties and charges be so levied, or otherwise paid or satisfied (*b*).

Any constable or peace officer refusing or neglecting, upon due notice, or on his own view, to assist in executing this act, being required, on conviction by confession or oath of one credible witness before the sheriff or steward-depute or substitute, or a justice of the peace of the place of the offence, forfeits L.10 for every offence (*c*).

The commissioners may act as justices or sheriffs, in granting convictions, and all other matters regarding those regulations (*d*).

(*a*) 55 Geo. III. c. 71, sect. 18.

(*b*) Sect. 13.—*Note*. It appears that though the hawker prosecuted for L.25 for not having procured a licence is acquitted by producing it in court, he may be subjected in L.10, under section 10, for having refused to shew it when duly required. Perhaps the charge ought to be alternative; that the hawker traded without having procured a licence and forfeits L.25; or that he refused to shew his licence when duly required, and forfeits L.10.

(*c*) Sect. 14.

(*d*) Sect. 19.

Prosecutions for penalties incurred must be brought within three kalendar months after the fact (*a*).

No person committed to any gaol or house of correction for any offence against this act, is to be detained longer than three kalendar months (*b*).

Any person finding himself aggrieved by the judgment of a justice, may appeal to the justices at the next general sessions for the place, upon entering into a bond with two sufficient sureties, to be approved by such justice, to the amount of the penalty, together with a sum which, in the judgment of such justice, is adequate to the amount of the expences which may be awarded, conditioned to pay the amount of such penalties and expences as shall be adjudged in case such judgment shall be affirmed; and the justices at the general sessions are to summon and examine witnesses upon oath, and finally to determine the matter, or at their discretion to state the facts specially, for the determination of the Court of Exchequer; and, in case the judgment of the justice be affirmed, such court may award such expences, occasioned by the proceedings before them, as they may see meet (*c*).

No conviction or decree under this act, by any sheriff or steward-depute or substitute, can be advocated or suspended by the Court of Session; but the sheriff or steward, upon being required by the party, after granting bond as above directed, is to state the facts specially for the determination of the Court of Exchequer, who, if the judgment be affirmed, may award proper expences for the proceedings before them (*d*).

Every sheriff, steward, or justice, before whom a person is convicted of a penalty under this act, is to levy the King's share of the penalty, and to pay it to the collector of the cess of the county or stewartry in which it was levied, who is to transmit it to the receiver-general; and every sheriff, steward, or justice, before whom a conviction is had, is to transmit an account of the amount of the penalty to the clerk of the commissioners, within one kalendar month after the date of the conviction (*e*).

When the Court of Exchequer give judgment for a penalty, they are to direct the King's share of it to be levied by the sheriff or steward of the place in which the offender resides, or has his goods, who, upon receiving it, is to pay it to the collector of cess (who transmits it to the receiver-general) and is to send an account of it to the clerk of the commissioners, as

(*a*) 55 Geo. III. c. 71, sect. 27.

(*d*) Sect. 22.

(*b*) Sect. 20.

(*e*) Sect. 23.

(*c*) Sect. 21.

directed in the case of penalties recovered upon convictions by a sheriff, steward, or justice (*a*).

If any person, hereby directed to transmit an account of a penalty, omit or neglect to do so, he is liable in a penalty not exceeding double the amount of the sum of which an account ought to have been transmitted; and if any person who ought to pay a sum to any collector, or to the receiver-general, omit to do so as directed, he is liable in a penalty equal to the amount of such sum; and if he appear to have wilfully omitted to make such payment, he is to be deprived of his office, and is declared incapable of serving his Majesty in any office of trust or emolument; all which penalties are to be recovered and applied as other penalties under this act (*b*).

### III. PROTECTION TO PERSONS ENFORCING.

If any person be sued or prosecuted for any thing done in pursuance of this act, he may, in the Court of Exchequer, plead the general issue, and give this act and the special matter in evidence; and, if he prevail, is to have triple costs; and, in the Court of Session, he may deny the libel, and shew that the act was done under the authority of this act; and, if he prevail, he is to have triple costs (*c*).

Prosecutions for any thing done under this act must be brought within three kalendar months after the fact (*d*).

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### HIGHWAYS, BRIDGES, AND FERRIES.

SEVERAL general regulations have, at different periods, been made by the legislature with regard to highways, bridges, and ferries. In later times, however, those regulations have, in many cases, been modified or superseded by local acts, particularly in the case of highways. By a late statute, those general regulations have been altogether repealed, in so far as regards *turnpike* roads, and general regulations have been made applicable to such roads.

It seems therefore to be proper to consider, 1st, The general regulations applicable to highways, not being turnpike

(*a*) 55 Geo. III. c. 71, sect. 24.

(*b*) 55 Geo. III. c. 71, sect. 25.

(*c*) Sect. 26.

(*d*) Sect. 27.—*Notes.* The acts 7 Anne, c. 7; 1 Geo. I. c. 12; 25 Geo. III. c. 78; 29 Geo. III. c. 26; 35 Geo. III. c. 91, with regard to hawkers and pedlars, do not extend to Scotland.



roads, bridges, and ferries; and, *2dly*, The general regulations applicable to turnpike roads.

**I. GENERAL REGULATIONS APPLICABLE TO HIGHWAYS, NOT BEING TURNPIKE ROADS, BRIDGES, AND FERRIES.**

**1. *Who have charge of highways, not being turnpike roads, bridges, and ferries, their meetings and officers.***

The justices of the peace are charged with the care of highways by the general statutes (*a*); and of bridges and ferries by later statutes (*b*). The commissioners of supply are, by later statutes confirming and enlarging the former, appointed to meet with the justices upon the subject of highways, bridges, and ferries, and are vested with the same powers in this matter as the justices (*c*).

Under the statutes cited below (*d*), the justices of peace (and the commissioners of supply) have the charge of repairing bridges even lying within royal burghs (*e*), and of regulating ferries in royal burghs (*f*).

The justices of the peace and commissioners of supply are directed to hold two general meetings in the year for the special business of the highways, bridges, and ferries; the first upon the same day, and at the same place, at which the commissioners of supply meet for assessing the land-tax; and the second upon the same day, and at the same place, at which the freeholders are assembled at their Michaelmas head-court; and the conveners of the shires are directed to give the same previous notice as for ordinary general meetings of commissioners of supply (*g*). Any five make a quorum (*h*). Fewer than a quorum cannot act in appointing a surveyor, or otherwise (*i*). The meeting may adjourn (*k*).

They are directed “to set down a particular list of the highways, bridges, and ferries, within their bounds, and to divide

(*a*) 1617, c. 2.—1661, c. 38.

(*b*) 1669, c. 16.—1670, c. 9.

(*c*) 1686, c. 2.—5 Geo. I. c. 30.—11 Geo. III. c. 53.

(*d*) 1669, c. 16.—1686, c. 2.—5 Geo. I. c. 30.

(*e*) *Inhabitants of Sneddon against the Magistrates of Paisley*, 27th February 1759.

(*f*) *Justices of Peace of Fife against Magistrates of Kinghorn*, 14th June 1762.—*Justices of Mid-Lothian and Fife against Galloway and others*, 1st August 1775.

(*g*) 11 Geo. III. c. 53, sect. 4.

(*h*) 5 Geo. I. c. 30, sect. 2.

—By 1686, c. 2, three were made sufficient in Kinross, Clackmannan, and Cromarty. This exception has not been repeated in 5 Geo. I. c. 30.

(*i*) *Wood against Justices of Peace of Berwick*, 31st July 1761.

(*k*) 5 Geo. I. c. 30, sect. 2.

“ the paroches of the said bounds as they lie most ewest (nearest) to the several highways to be repaired, and as they may have the most equal burden” (in allusion to the statute labour, to be presently noticed); “ and to appoint such of their number, or others, overseers of such parts and portions of the saids highways as are most convenient and nearest to their ordinary residence; and to nominate such of their number as they see fit to survey and give an account of the highways, bridges, and ferries, unto the rest; with power to them to appoint meetings, from time to time, till the said survey, list, and division of the said highways be closed” (*a*).

They may choose clerks, surveyors, or other officers, for putting the laws as to highways, bridges, and ferries, to execution; and if any clerk, surveyor, or overseer, of highways, bridges, and ferries, refuse to accept of the office, he is liable in a penalty of five pounds sterling (*b*). This penalty, and all other penalties in this act (other than such as are incurred by the tenants, &c. to be immediately noticed) are to be levied by sentence of the justices or commissioners of supply, or any five of them; and the prosecution is to be carried on at the suit of such surveyors or overseers as the justices and commissioners may appoint, and the expences are to be defrayed by the shires; and such penalties are to be applied for repairing such highways, bridges, and ferries, as the justices or commissioners of supply appoint; and, in default of such appointment, for repairing such as the Lords of Justiciary, in their circuits, direct (*c*). Prosecutions must be brought within a year after the offence (*d*).

The justices of the peace, or any two of them, and, in some instances, any one, are directed to impose the forfeitures, &c. for certain offences against the highways (to be noticed in their places).

It may be mentioned here, that it has been found that certain trustees of a parish under a local statute labour act, to whom the other trustees of the parish had delegated power to raise a certain civil process, had a sufficient title to pursue (*e*).

## 2. *Constructing, preserving, and repairing Highways, not being Turnpike Roads, Bridges, and Ferries.*

(1.) *Widening, altering, and shutting up highways.*—Highways must be twenty feet broad at least of clear passable road,

(*a*) 1669, c. 16.

(*b*) 5 Geo. I. c. 30, sect. 2.

(*c*) Sect. 7.

(*d*) Sect. 8.

(*e*) Oswald and Waddell against Lawrie and others, 17th Feb. 1827.

exclusive of the bank and ditch on each side ; or broader, if they have been so before ; and the justices of peace and commissioners of supply are directed to make, repair, and widen them, to that extent (*a*). Any two or more justices of the peace, or commissioners of supply, may survey the highways, and order them to be made of that width (*b*). Any heritor or occupier of lands through which those highways go, who apprehends wrong to have been done by the said two or more justices or commissioners of supply, in thus surveying and ordering, may appeal to the first general meeting of the justices and commissioners, whose determination is final (*c*).

The justices of the peace and commissioners of supply, in a general meeting held for the purpose, may order the highways to be still farther widened, not exceeding thirty feet, exclusive of the bank and ditch, in such places and for such distances as they think proper ; and full satisfaction must be made to the owners and lessees of the ground taken (*d*). Any two justices or commissioners of supply may examine the highways within the shire ; and where they think that any part should be thus further widened, or that fences should be removed for widening, they are to state their reasons in writing to the next or following general meeting ; and if the general meeting, after hearing parties, think it of public benefit so to widen the highways, or to remove fences, it is to be done, satisfaction being previously made to the owners and lessees for the ground taken beyond twenty feet or the former width, and for the damage by removing fences (*e*). When no agreement has been made with the owner, where the roads are to be so widened, or whose fences are to be altered, by order of the general meeting of justices and commissioners of supply, application is to be made to the sheriff, to summon a jury for valuing the ground, or estimating the damage by removing the fences. Upon payment of the sum awarded, and a discharge of it lodged with the sheriff or steward-clerk, the justices and commissioners may use the ground (*f*). Thirty days notice must be given to the owner of the day on which the jury are to meet (*g*). The commissioners of supply, at their annual meeting for assessing the land-tax, are to lay an additional assessment for payment of such sums awarded in the preceding year (*h*).

If any part of the highways require to be changed, the gene-

(*a*) 1669, c. 16.—11 Geo. III. c. 53, sect. 1.

(*b*) 11 Geo. III. c. 53, sect. 5.

(*e*) Sect. 5.

(*f*) Sect. 7.

(*c*) Sect. 6.

(*g*) Sect. 8.

(*d*) Sect. 2, 3.

(*h*) Sect. 9.

ral meeting of justices and commissioners of supply (*a*) appoint three of their number to visit the places where they need to be changed, and to set down meiths for the new way; and upon oath to estimate the damage of the parties, and to deliver the estimate to them in writing under their hands, that the damage may be satisfied by the whole shire (*b*). When a road is to be altered in this way, it is essential that the damage to the proprietor, through whose grounds it is to pass, be ascertained, before any thing be done towards carrying the alteration into effect (*c*).

To encourage heritors, &c. to plant their estates, "liberty and power is granted to them, at the sight of the sheriffs, "stewarts, lords of regalities, barons, and justices of peace, "in their respective bounds" (now justices of the peace and commissioners of supply) "to cast about the highways to their "convenience, providing they do not remove them above two "hundred ells upon their whole ground" (*d*). This alteration must be made wholly at the expence of the proprietor for whose sake it is made; in particular, he ought not to have any part of the statute labour (*e*).

The justices, &c. have no authority to stop up one of two public highways which are useful to the country, though near each other (*f*). They have power, however, to shut up bye-roads, which are unnecessary (*g*); but not any foot or horse road to church or mill (*h*).

(2.) *Constructing and Regulating Bridges and Ferries.*—The justices and commissioners of supply are directed to make and repair bridges and ferries, where they are found necessary. They are directed to visit the ferries in their shire; and, when they lie betwixt two shires, to correspond with the justices and commissioners of supply of the other shire, that they may appoint fit boats and convenient landing places, and

(*a*) 5 Geo. I. c. 30, sect. 2.

(*b*) 1669, c. 16.

(*c*) Justices of Peace of Clackmannan against Magistrates of Stirling, 5th December 1772.

(*d*) 1661, c. 41, confirmed by 1685, c. 30. It seems to have been found, in one case, sufficient that the new road be not above 200 ells longer than the old.—Town of Burntisland against Bruce, 17th June 1742, Elchies. Lord Kilkerran, however, inclines to think that the new road must not be above 200 ells distant from the old. Servitude, No. 1.

(*e*) Tenants of Libberton, &c. against the Justices of Peace of Mid-Lothian, 21st July 1724, Edgar.

(*f*) Turner against Duke of Roxburghe, 14th June 1749; Kilk. Highways, No. 1; Falc.—Napier against Robison, 7th August 1782.

(*g*) Turner, *supra*.

(*h*) Urie against Stewart, 25th June 1747, Kilk. Servitude, No. 1. An apparently opposite decision in No. 2, turned partly upon specialties, and does not seem to have overthrown the former.

so to regulate the ferries that the inhabitants may be readily and conveniently served, and at reasonable rates, and to punish all such as neglect or transgress the rules set down by them (*a*).

(3.) *Preserving highways, bridges, and ferries, from injury*.—If any persons injure the highways, by ploughing up any part of them, laying stones, rubbish, or dung on them, or any way breaking or pooling them, or turning in or damming water upon them, or injure the highways, bridges, or ferries, in any way, the justices and commissioners of supply, at their general meeting (*b*), may convene them, and, in case of conviction, by “oath” (that is, the oath of the offenders) “or witnesses,” are to fine them as they see just, and to pound for the fine, and apply it for the use of the highways (*c*). When stones, rubbish, dung, or other impediments are found on the highways, or water turned in or dammed upon them, this is to be held to be done by the labourers of the land next adjacent, who are to be fined for it by the justices and commissioners, reserving to them to call the real actors before the justices and commissioners for their relief (*d*).

(4.) *Repairing highways, bridges, and ferries*.—The different statutes appoint those having charge of the highways, bridges, and ferries, to repair them (*e*). The roads must be so repaired that horses and carts may travel upon them summer and winter (*f*).

The surveyors appointed must, every six months, or sooner if required by warrant of two justices, survey all the highways, bridges, and ferries, within the precinct, and give account in writing of their condition, especially of defects, nuisances, or encroachments, and of what repairs are wanting, to the justices and commissioners of supply, at their first meeting thereafter. Surveyors neglecting to give such account, or to prosecute offenders, are to suffer the same penalties as if they refused to execute the office (*g*); which are mentioned, sect. Who have charge of highways, &c.

The justices and commissioners of supply are directed to deliver to the circuit court yearly a report of the condition of the highways, bridges, and ferries, mentioning the number of men and horses employed upon them during the preceding year; to be recorded by the clerk of the peace or of supply (*h*). This direction was at one time followed; but has not been so for several years.

(*a*) 1669, c. 16.—5 Geo. I. c. 30.      (*b*) 5 Geo. I. c. 30.—14 Geo. III. c. 53.      (*c*) 1669, c. 16.      (*d*) Ibid.      (*e*) 1661, c. 38.—1669, c. 16.—1670, c. 9.—1686, c. 3.—5 Geo. I. c. 20.—11 Geo. III. c. 53.  
(*f*) 1669, c. 16.      (*g*) 5 Geo. I. c. 30; sect. 5.      (*h*) Sect. 6.



### 3. *Means of constructing and repairing Highways, not being Turnpike Roads, Bridges, and Ferries.*

(1.) *Statute labour.*—The justices of the peace and commissioners of supply, or the officers or overseers to be appointed by them, are required to convene all tenants, cottars, and other labouring men within their bounds, by public intimation at the parish church upon Sunday, immediately after the first sermon, or any other way that they think fit, to work three days before the last of June, not being in seed time, and three days after harvest every year, till the highways, bridges, and ferries, are sufficiently repaired, on such days and at such places as the commissioners or their officers appoint (*a*), with horses, carts, sleds, spades, shovels, picks, mattocks, and such other instruments as are required (*b*). This comprehends not only all persons living in the country, but even persons living in burghs, *e. g.* shopkeepers, weavers, masons, wrights, coopers, smiths, &c. even sailors who are fishers, or ply in passage boats, but not those who go upon foreign voyages or coastways (*c*); and even apprentices to artificers in towns (*d*). It was once found that persons employed in the collieries are not liable; partly because they then were *ascripti glebæ*, and partly because the withdrawing them from their work for six days might do great injury to their masters (*e*). The former reason does not now apply; the latter still does.

The justices and commissioners, or their officers, may design such of those persons as they find most skilful, to attend and direct the rest, and may appoint them fit wages for their attendance (*f*).

Every tenant, &c. failing to come to work (on notice at the parish church where he resides, on the Sunday immediately preceding) pays one shilling and sixpence sterling for every day's failure, unless he send a man to work for him, to be levied by distress and poinding of the absentee's goods, by warrant under the hands of any two justices or commissioners of supply, on a certificate of the overseer that such person was

(*a*) 5 Geo. I. c. 30, sect. 3.—Walker and Herd against Thomson, 17th December 1760.

(*b*) 1669, c. 16.—1670, c. 9.

(*c*) Hamilton against Inhabitants of Kirkcaldy, 24th July 1760, Kilk. Highways, &c. Falc. vol. ii. No. 153.—Trustees of Turnpike from Queensferry to Perth against Magistrates of Perth, 1st February 1767.—Trustees of Glasgow Turnpike against Inhabitants of Paisley, 11th January 1758, Dict. iv. 291.

(*d*) Mackay, &c. against Justices of Peace of Ross, 27th November 1807.

(*e*) Earl of Eglinton against Justices of Ayr, 7th March 1776, Dict. iv. 201.

(*f*) 1669, c. 16.—5 Geo. I. c. 30, sect. 3.

absent (*a*). The penalty for the absence of a man and horse is thirty shillings Scots for each day, to be recovered by poinding (*b*). If the absentees have no poindable goods, they may be punished in their persons, as the justices, &c. having charge of the roads, see cause (*c*). These penalties are to be used to hire others in place of the absentees (*d*). For farther particulars of prosecutions under 5 George I. c. 30, see sect. Who have charge of highways, &c.

Where the ways lie at a great distance from those who are liable to repair them, the justices, commissioners, &c. and overseers, may dispense with those persons, they paying six shillings Scots yearly for each man, and twelve shillings Scots for each horse, to be expended on men to work in their place (*e*). The justices of peace and commissioners of supply have a discretionary power to determine what roads shall be first repaired, and to divide the shire into districts; but they cannot call out any person who lives at such a distance from the road to be repaired that he "cannot come and go in a day, and work "a day's work," under a higher penalty than six shillings Scots yearly for each man, and twelve shillings Scots for each horse (*f*).

The rates of pecuniary conversion of the statute labour have in most places been raised by local acts.

(2.) *Road, bridge, and ferry money.*—As the statute labour may not be sufficient to repair the highways, bridges, and ferries, the freeholders and heritors are directed to meet at the head burgh, on the first Tuesday of June yearly, and to call for an account from the justices and commissioners of supply of what is needful for repairing the highways, and for making or repairing bridges and ferries, and to stent the heritors, comprehending the heritors of the burgh lands, not exceeding ten shillings Scots upon each hundred pounds of valued rent in one year, to be uplifted by the justices and commissioners, or whom they appoint, by poinding; and of which they are to give an account to the heritors at the next Michaelmas head court, yearly (*g*).

Where bridges and ferries are upon the confines of two shires, the justices of the peace and the commissioners of supply in both shires are to meet and adjust the expence of repa-

(*a*) 5 Geo. I. c. 30, sect. 4.

(*b*) 1669, c. 16.

(*c*) Ibid.

(*d*) Ibid.

(*e*) 1670, c. 9.

(*f*) Justices of Peace and Commissioners of Supply of Berwick against Tenants of Cockburnspath and Coldingham, 4th January 1757:

(*g*) 1669, c. 16.—5 Geo. I. c. 30.—11 Geo. III. c. 53.

ration proportionally to the valuation of the shires. The sheriffs or their deputies to convene them (*a*).

(3.) *Mortifications*.—Where there have been any destinations or mortifications to highways, bridges, or ferries, the justices and commissioners of supply (*b*) may call for an account from the intromitters, and apply the sums, not already applied, to the uses for which they were destined (*c*).

#### 4. *Preserving order on Highways, not being Turnpike Roads.*

(1.) *Name on cart, &c.*—No person can drive any cart, car, or any waggon, sledge, or dray, upon the high roads or streets in Scotland, unless the master or owner place upon some conspicuous part of it the name of the owner, and of his place of residence, or of the house or farm where the owner generally employs it, in different colours from its body; and also the numbers, where more carts, &c. than one belong to the same person (*d*), on forfeiture of from twenty shillings to five shillings sterling for each offence (*e*). If the property of such carriages be altered, the succeeding owners must, within fourteen days after they become owners, and have used them, cause the name, residence, and number to be rectified, on forfeiture of from twenty shillings to five shillings (*f*). Any person placing a false name or place of residence upon such carriages, forfeits not exceeding forty shillings (*g*).

(2.) *Driver in chaise or on cart, or causing damage, &c.*—If any chaise-driver sit in his chaise without another person on one of the horses driving it, or if any “carter, drayman, carman, sledge-man, or waggoner, or the driver of any other carriage whatsoever (coaches, chaises, phaetons, curricles, chairs, and such other carriages which are usually driven by a person sitting within or upon the carriage, and such carriages as are respectively drawn by one horse only, or by two horses abreast, and are conducted by some person holding the reins of such horse or horses, excepted) shall ride upon any such carriage” (not having some person on foot or on horseback to guide it), on any street of any city or town, or on any highway within six miles of Edinburgh, or four miles of Glasgow, or two miles of any other city, burgh, market-town, or borough of regality or barony; or if the driver of any carriage whatsoever on any street, or highway, by negligence or misbehaviour,

(a) 1686, c. 8.—5 Geo. I. c. 30.

(b) 5 Geo. I. c. 30. sect. 2.

(c) 1669, c. 16.

(d) 12 Geo. III. c. 45, sect. 1.

(e) Sect. 2.

(f) Sect. 3.

(g) Sect. 4.



cause any hurt or damage to any person or carriage, or impede or prevent the free passage of carriages or persons; or if any driver of any cart, &c. on any highway, when riding on his carriage, do not dismount (so as the better to guide his horse or carriage) when required by any person apprehending danger, for every offence he forfeits not exceeding ten shillings if he be not the owner; and if he be the owner, not exceeding twenty shillings sterling (*a*).

(3.) *Driving abreast.—Obstructing.—Bridle, &c.*—No drivers of carts or other carriages can drive abreast, so as to obstruct the passage, but one after another; and the drivers must have bridles or halters upon every horse; which bridles upon the foremost horse must (in all carriages not drawn by more than two horses) be tied with a rope to the halter or bridle of the horse behind, and which rope or bridle the driver must have in his hand, on forfeiture of from twenty shillings to five shillings (*b*).

No drivers of horses or other beasts can drive them so as wilfully to obstruct the free passage, or to cause danger to persons, but in a line, having a bridle or halter affixed to the head of each beast; and the driver or owner of any cart or other carriage must not leave it on any street or highway after the horses have been unyoked, except during the time of loading or unloading; nor can any person leave stones, lime, timber, rubbish, dead horses, or other animals, or other nuisances, upon the streets and highways, so as to obstruct a free passage, on forfeiture of from twenty shillings to five shillings (*c*). (See preceding section.)

(4.) *Passing loaded horses, carts, &c.*—The driver of every loaded beast of burden, and of every cart, &c. coach, &c. must, on meeting another loaded beast of burden, or another cart, &c. coach, &c. hold to the *near side* (that is, to his own left hand) on forfeiture of from five shillings to twenty shillings (*d*).

It is understood in practice that the driver of any sort of carriage keeps to his own left hand, in like manner, when *overtaken* by another carriage; although there is no legislative regulation or penalty on the subject in the general regulations for highways not being turnpike roads, although there is in many local acts, and also in the general regulations for turnpike roads, as afterwards noticed.

(5.) *Procedure for breach of order.*—Prosecutions for any of the several offences before mentioned, punishable by this act, may be brought summarily before the sheriff, or any jus-

(*a*) 12 Geo. III. c. 45, sect. 5.

(*b*) Sect. 6.

(*c*) Sect. 7.

(*d*) Sect. 8.

tice of the peace where the offence is committed, or before any of the magistrates of cities or boroughs, where offences are committed within their jurisdiction, or before any other judge competent; and judgment is to be given upon confession, or upon oath of one witness (*a*). Any person aggrieved, and intending to sue for the penalties in this act, may, without any other warrant, carry the offender before any justice of the peace or other judge competent, to be dealt with as before directed, upon proof by confession or the oath of one witness; and any person, seeing any of the offences committed, may, without any other warrant, detain the "horses, carts, cars, "sledges, waggons, drays, coaches, chariots, landaus, and other "such like machines and carriages, and the horses belonging to "the several offenders," till sentence; and if the penalties be not paid, or security found for them, within twenty-four hours after conviction and sentence, then the judge is to issue his warrant to a constable, to cause sale to be made of the subjects detained, if the property of the offender, for raising the money forfeited by him, rendering to the offender the overplus, after deducting the charges of sale, and the expence of keeping the subject detained, both of which are to be determined by the judge before whom the offender is convicted; and if the subject be not the property of the offender, it is to be returned to the owner, and the judge, in case the fine be not instantly paid upon conviction, or satisfactory security given for it, may commit the offender to gaol, to remain till the fine be paid or satisfactory security be found for it, or until the expiration of two months after commitment (*b*). Any person charged with offences against this act, resisting, abusing, or maltreating any person attempting to detain or seize him or his cart, &c. forfeits twenty shillings for every offence; to be proved, &c. as other offences against this act (*c*). Persons apprehended for offences and refusing to discover their names and places of abode to any judge, are to be committed until they do so (*d*). The fines are given, one half to the informers (by which is meant those who present the information or complaint to the Court) the other to the collector of the land-tax, to be accounted for as part of the funds for the detection and punishment of vagrants in Scotland (*e*). Prosecutions must be brought within three months. Appeal lies from the decisions of one or more justices to the next quarter sessions for the county, whose determination is final (*f*).

See *Stage Coaches.—Damages.*

(*a*) 12 Geo. III. c. 45, sect. 9.

(*b*) Sect. 10.

(*c*) Sect. 11.

(*d*) Sect. 12.

(*e*) Sect. 13.

(*f*) Sect. 14.

## II. GENERAL REGULATIONS APPLICABLE TO TURNPIKE ROADS.

A general act, as already mentioned, has been passed for regulating turnpike roads in Scotland (*a*).

By this act the acts 1669, c. 16, 1670, c. 9, 1686, c. 8, 5 Geo. I. c. 20, 11 Geo. III. c. 53, and 12 Geo. III. c. 45, cited in the preceding observations on this subject, are repealed in so far as regards turnpike roads (*b*).

All the provisions of this act are extended to all acts of parliament relative to any turnpike road, passed or to be passed, except in so far as expressly varied, altered, or repealed, by any such act to be passed (*c*). But the local turnpike acts in general contain many provisions which are not superseded or affected by this act.

This act does not affect the enactments of 47 Geo. III. Sess. 1, c. 11, relative to certain roads in Fife (*d*). And the roads made under 43 Geo. III. c. 80, 59 Geo. III. c. 135, both relative to certain roads and bridges in the highlands, and the local act 56 Geo. III. c. 83, relative to the road from Glasgow to Carlisle, are exempted from its operation (*e*).

It may be mentioned that sheriffs and stewarts, within their shires and stewartries, are authorized to take affidavits of the answers made by proprietors and occupiers of lands, on applications made to them for their consent to turnpike acts; of which affidavits a form is prescribed (*f*). And proof of the handwriting of such sheriff or steward is to be deemed sufficient evidence of his signature before any committee of either House of Parliament (*g*).

### 1. *Who have charge of turnpike roads; their meetings and offices.*

The qualification of trustees for carrying into effect the general turnpike act, and all local turnpike acts passed, or to be passed, is to be that contained in each such local turnpike act respectively. They must take an oath (or affirmation if Quakers) in a prescribed form, with regard to their qualification (*h*).

No person is to act as trustee while he holds any place or employment of profit under any local act, or this act, or who is a tacksman of the tolls of any turnpike road. Persons act-

(*a*) 4 Geo. IV. c. 49.

(*b*) Ibid. sect. 1.

(*c*) Ibid. sect. 114.

(*g*) Ibid. sect. 116.

(*e*) Ibid. sect. 2.

(*d*) Ibid. sect. 3.

(*f*) Ibid. sect. 115.

(*h*) Ibid. sect. 4.

ing not being qualified, or being disqualified, or not having taken the oath if required, forfeit L.20 to any person who shall prosecute, to be recovered, with expences, by summary action before the sheriff or steward of the shire or stewartry in which the road is situated, or in the Court of Session; but their proceedings before conviction are valid (*a*).

Lending of money on the credit of the tolls, or receiving interest for money lent, does not disqualify a trustee (*b*).

The trustees having met under the authority of an act by which they are appointed, may adjourn. Proceedings only to be held at such meetings. Majority of a quorum (according to the local act) to decide. Preses appointed, to have deliberative and casting vote. Order made, not to be revoked or altered unless notice have been given at a previous meeting for the same road, and entered in the sederunt book, and by two advertisements in a newspaper usually circulated in the shire ten days before such meeting; or by affixing such notice for two consecutive Sundays on the church doors of the parishes within which the road is situated, and on all the toll-bars on the road, fourteen days before the meeting, to be proved by certificate of the precentor or toll-gatherer (*c*).

Two trustees, or the clerk on written requisition of two trustees, stating the purpose, may call a general meeting; the notice, stating the purpose, to be published twice in a newspaper circulated in the shire, or to be affixed on the toll-bars of the road, ten days before the meeting (*d*).

The trustees at any general meeting may divide the road into districts, and appoint committees, three to be a quorum (*e*).

The trustees at general meetings may appoint a clerk and treasurer, and also, if they think fit, a superintendant; and in district and committee meetings, they may appoint clerks, collectors, treasurers, surveyors, and other officers (*f*).

Trustees to take security from treasurer, unless all the money collected be lodged, in name of the trustees, with the Bank of Scotland, Royal Bank of Scotland, or British Linen Company, or their branches; and, if they think fit, to take security from any other officer, and to limit the sum beyond which he shall not retain money belonging to the trustees (*g*).

The clerk or his partner acting as treasurer, or the treasurer or his partner acting as clerk, forfeit fifty pounds to any person who prosecutes, to be recovered by summary action in the Court of Session (*h*).

(*a*) 4 Geo. IV. c. 49, sect. 5.

(*b*) Ibid. sect. 7.

(*c*) Ibid. sect. 8.

(*d*) Ibid. sect. 9.

(*e*) Ibid. sect. 10.

(*f*) Ibid. sect. 11.

(*g*) Ibid. sect. 12.

(*h*) Ibid. sect. 13.

Orders and proceedings of trustees, with the names of those present, to be entered by the clerk in a book, to be signed by the preses; to be open to inspection of the trustees; extracts by the clerk to be received in evidence as extracts of proceedings of courts of law (*a*).

Books of account to be kept by the clerk; and to be open to inspection of the trustees, or any creditor on the tolls, *gratis*, or any person liable to pay any of the tolls, on payment of five shillings, who may take copies; and to be produced at meetings. On failure to give inspection, to allow copies to be taken, or to produce at meetings, the clerk is liable in a penalty not exceeding five pounds, to be levied and applied as other penalties (*b*), as afterwards mentioned in the section relative to judicial procedure.

Trustees to sue and be sued in name of their clerk or treasurer. Expences to be defrayed from the funds (*c*).

Officers to account, deliver vouchers, and to pay balance. If any officer refuse or wilfully neglect to account or deliver up vouchers, or, for fourteen days after requisition, so refuse or neglect to deliver up books, papers, tools, &c. belonging to the road, the sheriff or steward, or quarter-sessions for the shire or stewartry where he is, or resides, on complaint by the trustees, may determine such complaint summarily, and may cause such money as may appear to be due to be levied by poinding and sale, returning the overplus after paying expences of poinding and sale; and if sufficient effects cannot be found, or if it appear that the officer wilfully refused to account or to deliver up books, &c. the sheriff, steward, or quarter-sessions may commit him to the house of correction or common gaol of the county or stewartry, till he give a true account and produce the vouchers, and pay the balance due by him, or a composition accepted by the trustees, or till he deliver up the books, &c. or give satisfaction to the trustees; but no officer committed on account of not having sufficient effects is to be detained in prison under this act longer than six kalendar months (*d*).

The trustees of every turnpike road, or a committee, must annually audit the accounts of the clerks and treasurers, examine the state of revenues and debts of the several roads, and make up abstracts containing the revenues and debts of the trust, and an account of all bonds by the trustees; and to be signed by not fewer than three trustees (*e*).

No tacksman of tolls, or toll-gatherer, or other person hold-

(*a*) 4 Geo. IV. c. 49, sect. 14.

(*b*) Ibid. sect. 16.

(*c*) Ibid. sect. 18.

(*c*) Ibid. sect. 16.

(*d*) Ibid. sect. 17.

ing any place of profit under the trustees, is to sell any wine, ale, spirituous liquors, or provisions, by retail. But, where a toll-bar is situated in any remote part of the country, and the trustees of the road represent to the quarter-sessions that it will be convenient to travellers that the tacksman, toll-gatherer, or other person stationed at the toll, should be licensed to retail provisions, and ale, and spirituous liquor, the quarter-sessions may grant a licence to such person, in the form granted by justices to publicans; and such person may then receive an excise license, subject to all the regulations applicable to persons dealing in ale or spirituous liquors (*a*).

Any two trustees, upon the death of any person appointed to collect the tolls for the trustees, may appoint a fit person in his place till the next meeting of the trustees. And if any person discharged from office by the trustees refuse to deliver up the possession of his house, garden, and pertinents, within three days after notice of his discharge being given to him or left at his house, or, if the wife or family of any such collector who dies, refuse to deliver up the possession of the house, garden, and pertinents, within three days after the new appointment, the sheriff, steward, or any justice of the peace for the shire or stewartry where the toll is, may, by warrant under his hand, order a constable or other peace-officer, with necessary assistance, to enter in the day-time, to remove the occupiers, and to give entry to the person appointed to collect the toll (*b*).

## 2. *Constructing, preserving, and repairing turnpike-roads.*

(1.) *Widening, altering, and shutting up turnpike-roads.*—Trustees may widen all turnpike roads to twenty feet of clear passable road, without making any compensation for the ground taken, but they are liable for the damage to the proprietor by altering or removing fences (*c*). They may widen to forty feet of clear passable road, exclusive of the bank or ditch on either side, on making satisfaction to the proprietors or occupiers for the ground taken beyond the width of twenty feet (*d*).

Trustees may purchase, feu, take in lease, or otherwise acquire lands and buildings necessary for widening, diverting, altering, or improving the roads, or for toll-houses, &c. on making satisfaction to the proprietor and occupier (*e*). If the parties do not agree, the compensation is to be fixed by a

(*a*) 4 Geo. IV. c. 49. sect. 19.

(*b*) Ibid. sect. 50.

(*c*) Ibid. sect. 56.

(*d*) Ibid. sect. 57.

(*e*) Ibid. sect. 58.

jury summoned by the sheriff (*a*). Lands and houses required, become the property of the trustees, by discharge of the price or consignment in Bank of Scotland, Royal Bank, or British Linen Company, and recording the discharge, or the voucher of the consignment, in the sheriff-court books (*b*).

Proprietors of entailed estates and trustees, tutors, and curators of any person under legal disability or incapacity, may renounce every claim of damage or otherwise, for ground and materials required for turnpike roads (*c*).

Compensation for lands, &c. taken by road trustees, held under entails, subject to liferents, &c. and which amounts to two hundred pounds, to be applied by directions of the Court of Session for certain purposes, for the benefit of the estate (*d*). Where the compensation is less than two hundred pounds and not less than twenty pounds, to be applied in a similar manner, with certain modifications (*e*). Where the compensation is under twenty pounds, to be applied for the benefit of the persons entitled to the rents or profits as the road trustees, or any two of them, may direct (*f*). In case of not making out titles, &c. purchase-money to be paid into the bank, subject to the order of the Court of Session (*g*). Where any question arises regarding the right to such money, the persons who had been in possession of premises to be deemed entitled, unless the contrary be proved (*h*). The Court of Session may order reasonable expenses of purchases to be paid by the trustees out of the purchase-money (*i*).

The trustees have power to carry the roads through ministers' glebes, making addition to the glebe in proportion to the ground taken off (*j*).

The valued rent of lands is not altered by part being taken by trustees (*k*).

Trustees, in altering any turnpike-road, are not to deviate over any inclosed lands more than one hundred yards from the course of the turnpike-road, or to take down any building, the side walls of which exceed twenty feet in height, or to make use of any policy, orchard, garden, the contents of which exceed half an acre, lawn, planted walk, or avenue to a house, or any inclosed ground planted as an avenue or shelter to a house, without the written consent of the owner or his agent (*l*).

Nothing contained in this act is to limit the powers contain-

(*a*) 4 Geo. IV. c. 49, sect. 59, 60, 61,

(*c*) Ibid. sect. 26.

(*f*) Ibid. sect. 68.

(*i*) Ibid. sect. 71.

(*l*) Ibid. sect. 74.

(*d*) Ibid. sect. 66.

(*g*) Ibid. sect. 69.

(*j*) Ibid. sect. 72.

(*b*) Ibid. sect. 62.

(*e*) Ibid. sect. 67.

(*h*) Ibid. sect. 70.

(*k*) Ibid. sect. 73.

ed in any turnpike act existing at the passing of this act, for making, altering, or diverting any turnpike road, or the course thereof (*a*).

No buildings are to be erected, or inclosures to be made along the sides of any turnpike-road, within twenty-five feet from the centre; and no places from which the trustees of any turnpike-road were in the use of taking materials previous to the passing of this act (4th July 1823) are to be inclosed, until the proprietor or occupier have given one month's previous notice to the trustees, otherwise the trustees are not liable in compensation for the value of such buildings or inclosures if they afterwards have occasion to remove them; and the inclosing of such place for materials does not preclude the trustees from re-opening it. The notice is to be given to the trustees by a letter addressed to their clerk, who is to lay it before the next general meeting or adjourned general meeting, which is to insert a copy of it in their minutes (*b*).

When a new turnpike road is completed in lieu of the old road, and when the old road in consequence becomes useless, the trustees may apply to the justices of the peace for the shire in which the old road lies to have it shut up; fifteen days' notice of the application to be given by advertisement in a newspaper generally circulated in the shire, or upon each of the toll-bars on that road; and the justices may make such order as may seem just. And all such parts of the road as are authorised by them to be shut up (except when given in exchange to the proprietors of lands or buildings) may be sold by the trustees. But if the old road lead to any place which cannot, in the opinion of the justices, be conveniently accommodated with a passage from the new road, the old road is to be sold subject to the right of way to such place (*c*). Toll-houses, &c. become useless may be sold (*d*). When any parts of the old road, or any toll-house, are to be sold, the trustees are first to offer them to the person from whom they were purchased, and then to the adjoining proprietor; and if such person refuse to purchase (except on account of the price) an oath before a justice of the peace for the place where the ground is situate, by an indifferent person, stating that the offer was made and refused, such oath is sufficient proof; but if the parties only differ with regard to the price, it is to be determined by a jury as before mentioned (*e*).

(2.) *Footpaths and temporary roads*.—Trustees may make and keep in repair footpaths on the sides of turnpike roads, on

(*a*) 4 Geo. IV. c. 49, sect. 74.

(*c*) Ibid. sect. 63.

(*d*) Ibid. sect. 64.

(*b*) Ibid. sect. 88.

(*e*) Ibid. sect. 65.



making satisfaction to the proprietors and occupiers when the road exceeds twenty feet in width ; and a road through the grounds adjoining to any ruinous or narrow part of any turnpike road (not being the site on which any house stands, nor being a garden, lawn, policy, planted walk, or avenue to any house, or any enclosed ground planted and set apart as a nursery for trees) to be used while the old road is repairing or widening, making compensation to the proprietor or occupier for damages ; and if the parties differ as to the amount, the sheriff, steward, or any two justices of the peace, on three days' notice in writing by either party to the other, may determine the damages to be paid to the proprietor or occupier, as before directed (a).

The power given to proprietors of entailed estates, &c. to renounce damage for ground taken, and the effect of not giving notice to the trustees before building or enclosing within twenty-five feet from the centre of the road, have been already noticed.

(3.) *Drains and ditches.*—Trustees may make side drains to conduct the water into any adjoining land, ditch, or water-course (such land not being the site of a house or garden) in the manner least injurious to the proprietor or occupier ; the side drains to be maintained by the trustees (b).

The trustees may make ditches along the sides of the road ; and if the land be enclosed, the ditch is to be made on the field side of the fence ; and with power to make proper outlets from the side ditches through any lands adjoining the road (not being the site of any house or garden) in the manner least injurious to the proprietor or occupier of such land ; and, unless the land be uninclosed and waste, the proprietor or occupier is to keep clear such ditches and outlets, and all present ditches along the sides of the road, when required by the trustees or their surveyor. And, in case of neglect, the trustees or surveyors may clear them, and levy the expence upon the proprietor or occupier as other penalties by this act. But any proprietor may substitute, to the satisfaction of the trustees, any other equally effectual ditch or outlet in place of that constructed by the trustees (c).

(4.) *Milestones and direction posts.*—The trustees of turnpike roads may cause milestones to be set up, and direction posts at cross roads. And whoever wilfully damages them, or defaces or spoils any of the marks upon them, on conviction

(a) 4 Geo. IV. c. 49, sect. 79.

(b) Ibid. sect. 80.

(c) Ibid. sect. 81.

before the sheriff, steward, or any justice of the peace for the shire or stewartry where the offence is committed, or where the offender is found or resides, by the oath of one witness, or other competent evidence, forfeits a sum not exceeding five pounds for each offence (*a*).

(5.) *Parapets and fences.*—The trustees of every turnpike road are to erect sufficient parapet walls, mounds, or fences along the sides of all bridges, embankments, or other such dangerous parts of the roads; and if they fail, the procurator-fiscal of the shire or stewartry in which the road is situated, or any commissioner of supply for such shire or stewartry, upon finding security to pay the expences of process if he fail in his action, may prosecute the trustees before the sheriff or steward, who is to decide the matter in a summary manner; and, upon finding the complaint well founded, may oblige the trustees to remedy the matter complained of, and adjudge to the prosecutor full expences of process; but if the prosecution be found groundless, the private prosecutor is to be liable in expences (*b*).

(6.) *Procuring and conveying materials for constructing and repairing turnpike roads, &c.*—The trustees of every turnpike road, or persons authorised by them, may take materials for making or repairing the road and the foot paths, or building or repairing any toll house, bridge, or any other work connected with the road, from any common land or waste, without paying for such materials, and may carry them through any person's ground without being deemed trespassers, they filling up the pits or quarries, levelling the grounds from which the materials were taken, or fencing such pits or quarries to prevent danger, and paying for or tendering the damage done by going through enclosed or arable lands, to be ascertained as after mentioned. And such trustees and other persons may dig and carry away any such materials from the land of any person where they are found, within any parish in which any part of the turnpike road is situated, or in any adjoining parish (such materials not having been dug or raised for private use of the owner of the land, and the land not being an orchard, garden, lawn, policy, nursery for trees, planted walk or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, and unless where materials have been taken by the trustees previous to the passing of this act), the trustees making or tendering such satisfaction for stones taken from quarries let for hire, and for surface damage, as

(*a*) 4 Geo. IV. c. 49. sect. 89.

(*b*) Ibid. sect. 98.

they judge reasonable. And they may also land on and carry through or over any enclosed lands (not being a garden, lawn, planted walk, policy, orchard, avenue to a house, or nursery for trees, nor enclosed ground planted as an ornament or shelter to a house) or over any open uncultivated land, or any common, any materials for making or repairing any such road, or for building or repairing any toll-house, bridge, or other work connected with such road, paying or tendering for the damage done to enclosed lands such sum as they judge reasonable. And if the trustees and the proprietor and occupier of such lands differ as to the amount of the payments and damages before-mentioned, the sheriff, steward, or two justices of the peace for the shire or stewartry within which the place from which the materials have been taken, or on which they have been landed or carried, is situated, on three days notice being given in writing, by either party to the other, are to hear and determine the amount of such payments and damages, and the expences attending the same (*a*).

When materials cannot elsewhere be got within a reasonable distance, any trustee or person acting under the authority of any turnpike act, or of this act, may search for, dig, and carry away any materials for making or repairing any turnpike road, or for building or repairing any toll-house, bridge, or other work connected with any turnpike road, from any enclosed or arable land, or from the sea shore, or from any river or water course, notice in writing by two trustees being given to the proprietor or occupier of the land, or of the lands on each side of the river or water-course, or his known agent, or left at his usual place of abode, to appear before any two justices of the peace acting for the shire or stewartry where the land, river, or water-course is situated, or if it be the boundary between two shires, before two justices of either shire, to shew cause why such materials should not be taken: and if the proprietor, agent, or occupier attend, but do not shew sufficient cause to the contrary, such justices may authorise such trustees or other persons to carry away materials at such time as to such justices may seem proper: and if such proprietor, &c. do not attend, such justices may (upon proof on oath of the service of such notice) make such order as they think fit; and the order of such justices is final (*b*).

Trustees may purchase, feu, or rent land for the purpose of getting materials, and may afterwards sell it by public roup,

(*a*) 4 Geo IV. c. 49, sect. 75.

(*b*) Ibid. sect. 76.

provided they dispose of it as before directed with regard to land not required for the purposes of any turnpike road (*a*).

No person is to take away materials provided for the use of any turnpike road, or to take materials from any quarry opened by turnpike trustees for getting materials, so as to interfere with the workings carried on by the trustees, under a penalty not exceeding five pounds. But the owner of any quarry may take materials from it for his own use solely (*b*).

The provision with regard to the effect of inclosing places used for materials previous to the passing of that act, and the power to proprietors of entailed estates, &c. to renounce damages, have been noticed in considering the widening and altering the turnpike roads.

*7. Conduits over ditches. Level of communications. Encroachments, &c.*—Where any other turnpike road, highway, or private road, or any passage is made from any turnpike road, or where a house is built on the side of it, those concerned must build and maintain sufficient conduits over the side drains and ditches, to the satisfaction of the trustees; and if they neglect to maintain them, the trustees may repair them, and charge such persons with the expence, and levy it as other penalties under this act. Such other turnpike road, highway, private road, passage, or house, is to be so constructed or built that the communication between them and the turnpike road shall be on a level with it. And those concerned are not to construct any mound, sloping bank, or make any projection upon any turnpike road; nor to cut or slope away any part of the sides of it, otherwise the trustees may remove the obstruction, and repair the defects, and recover the expence from those concerned, in the same manner as penalties by the act (*c*).

No person to turn any water, or conduct any drain across any turnpike road, except in the manner prescribed by the trustees; otherwise, for every offence, he forfeits a sum not exceeding five pounds, besides the expence of repairing the injury occasioned (*b*).

If any person fill up or obstruct any ditch at the side of any turnpike road, or any ditch used for conveying water from the road, or encroach by making any dwelling-house or other building, or otherwise, or make any drain, gutter, sink, or water-course across, or otherwise break up the surface of any turnpike road, without the consent in writing of the trustees or the

(*a*) 4 Geo. IV. c. 49, sect. 77.

(*b*) Ibid. sect. 78.

(*c*) Ibid. sect. 82.

(*d*) Ibid. sect. 83.

surveyor, or in ploughing or harrowing the adjacent unenclosed lands, turn any horse, plough, or harrow, upon such road, or the side ditches, he forfeits not exceeding five pounds for each offence; and the trustees may remove the evil at his expence. And the sheriff or steward, or any two justices of the peace for the shire or stewartry where the offence is committed, upon proof of the fact, may grant warrant for levying the expence, over and above the penalties imposed by this act, by pointing and sale of the offender's goods and effects, rendering the overplus (if any) to the owner (*a*).

(8.) *Cutting hedges and trees.*—Owners or occupiers of lands adjoining to turnpike roads are to cut and prune their hedges to the height of six feet from the ground, and to cut down or lop the branches of trees and shrubs growing in or near such fences, or other fences adjacent (such fences, trees, or shrubs not being in any garden, orchard, plantation, walk, or avenue to a house, nor any tree or shrub being an ornament or shelter to a house, unless it hang over the road, or any part of it, so as to impede or annoy any carriage or person travelling) so that the road may not be injured by the shade of it, and that the sunshine and wind may not be excluded. And if the owner or occupier do not comply with those regulations within ten days after notice by the surveyor, the surveyor may complain to the sheriff, steward, or some justice of the peace of the shire or stewartry where the road lies, who are to summon the occupier; and if it appear to the justice that he has not complied, such justice, upon hearing the surveyor and occupier or his agent (or upon due proof of the service of the summons) may order the hedges and trees to be cut down or pruned, so as best to answer the purpose: and if the occupier neglect such order for ten days after due notice of it, he forfeits two shillings for every twenty-four feet of hedge neglected, and twopence for every tree or shrub. And the surveyor, upon default, is to cut in terms of the order; and the occupier is to pay, besides the penalties, the expence of cutting, to be recovered as other penalties imposed by this act (*b*).

No person is to be compelled, nor any surveyor permitted, under this act, to cut or prune any hedge at any other time than between the last day of September and the last day of March, or to cut down or prune any ornamental trees (unless they hang over the road so as to impede or annoy any carriage or person travelling) if the proprietor of the land become bound

(*a*) 4 Geo. IV. c. 49, sect. 87.

(*b*) Ibid. sect. 85.

to pay the additional expence which their remaining unlopped may occasion to the trustees in keeping the road in repair (*a*).

(9.) *Assessing parish for damage*.—The trustees of every turnpike road where the parapet of any bridge, or any toll-house, toll-bar, fence, mile-stone, direction post, or any thing belonging to the trustees, is destroyed or injured, and the persons offending cannot be discovered and convicted, may complain to the sheriff, steward, or any two justices of the peace of the shire or stewartry in which the damage has been committed, having previously given notice in writing of their intention of making such complaint, on the church-door of the parish in which the damage has been committed for two consecutive Sundays, to be heard by such sheriff, steward, or justices, in a summary way: and if they sustain the complaint, they may assess the amount of such damage upon the proprietors, occupiers, and such other persons of the parish in which such damage has been committed as are liable for the payment of the conversion money leviable for statute labour in the shire or stewartry in which the parish is situated. And that assessment is to be levied by the trustees upon the same persons, in the same proportions, with the same relief to landlords against tenants, in the same manner, and with the same powers as are contained in the acts of Parliament for regulating and converting the statute labour of the shire or stewartry (*b*).

(10.) *Number of beasts of draught for carriages of burden. Broad wheels*.—Some of the turnpike roads in Scotland having been much injured by heavy carriages, particularly with narrow wheels, an act was passed, containing the following provisions, to prevent carriages of a weight requiring more than eight horses from being used, to discourage the use of heavy carriages in general, and to encourage the use of broad wheels (*c*). That act does not extend to any chaise-marine, coach, chariot, landau, berlin, chaise, chair, or calash (*d*).

No waggon, wain, cart, or other carriage, must be drawn by more than eight horses, or other beasts of draught, on any turnpike-road in Scotland, on pain of forfeiting five pounds sterling for every such offence; half to the informer, half to repair the road where the offence is committed, as the trustees or five of them may appoint (*e*). But any carriage may be drawn up a steep hill with as many beasts of draught as the trustees of the district, or any five of them, direct; a copy of their direction, under the hands of their

(*a*) 4 Geo. IV. c. 49, sect. 86.

(*c*) 32 Geo. II. c. 16.

(*d*) Ibid. sect. 8.

(*b*) Ibid. sect. 90.

(*e*) Ibid. sect. 4.

clerk, to be shewn, without fee, by the keeper of the nearest toll-bar, to the owner of such carriages passing, or his servants (*a*).

Where any waggon, wain, cart, or other carriage, is drawn by four or more horses, or beasts of draught, the trustees or commissioners for the repair of any highways in Scotland, in their respective districts, or five of them, or any person empowered by them, are to take at the toll-bars five shillings sterling additional for each beast drawing such carriage, to be levied in the same manner as any other toll payable at the same turnpike-gate; the money to be applied to repair the highway where it is collected (*b*).

The additional duty is not to extend to any carriage the fellies of the wheels of which are nine inches broad; nor to any carriage carrying one tree or piece of timber, one stone or block of marble, or any machine in one piece, which cannot be drawn by fewer than four horses; nor to any carriage drawn by oxen or neat cattle only, or along with two horses, and no more (*c*).

Any person taking off any beast before it comes to a turnpike, to avoid paying the additional toll, on conviction before these trustees, or five of them, by one witness, forfeits twenty shillings sterling; half to the informer, half to repair such parts of the road as the trustees appoint (*d*). Every person driving any carriage upon any part of any turnpike-road, with more horses than it has on the same day in passing through any turnpike-bar, is to be deemed to have taken them off to avoid paying the additional toll (*e*).

Waggons and carts, with fellies six inches broad, drawn by three horses, mares or geldings, are only liable to such toll as is imposed by the acts of Parliament made at the date of that act (1758) upon waggons and carts drawn by two horses (*f*).

The trustees for repairing any highway, or any five of them, may, by writing under their hand, order the fellies of all carriages, which ought to be of the breadth before directed, to be measured at any turnpike erected, or to be erected upon any part of the highway on which such carriage travels (*g*). If the measurer appointed think that the fellies were originally of the breadth of six or nine inches respectively, but have been reduced by wearing, the carriage may still travel, if the breadth be not diminished more than an inch (*h*). Any person attempting to prevent measuring the fellies, or using vio-

(*a*) 32 Geo. II. c. 15, sect. 5.

(*c*) Ibid. sect. 6.

(*f*) Ibid. sect. 7.

(*d*) Ibid. sect. 2.

(*g*) Ibid. sect. 9.

(*b*) Ibid. sect. 1.

(*e*) Ibid. sect. 3.

(*h*) Ibid. sect. 10.

lence to any person employed in measuring, and convicted before five of the trustees, by one witness, forfeits five pounds sterling; half to the informer, half to repair the road, as the trustees direct (*a*).

All tolls, duties, penalties, and forfeitures, imposed by this act, if not otherwise directed by this act, are to be levied by distress of the offender's goods, by warrant of any two justices of peace of the county or place where the offence is committed: and the person distraining is to sell the effects, and to return to the owner, on demand, the overplus, after paying the tolls, penalties, and forfeitures, and the reasonable charges of distress and sale (*b*). Appeal is competent from the trustees or justices to the general quarter sessions of the peace for the county, whose order is final (*c*). Any action against any person, for any thing done in pursuance of this act, must be brought within one month after the fact (*d*).

By the general turnpike act, waggons, carts, or other carriages, provided for the service of his Majesty's forces, or conveying any ordinance, or barrack, or commissariat, or other public stores belonging to his Majesty, or for the use of his Majesty's forces, are not subject to any additional toll, penalty, or forfeiture for over weight; nor can they be stopped or detained on account of weight, or of being drawn by any number of beasts of draught; but may have any number of beasts of draught, notwithstanding any thing to the contrary in any act of Parliament relative to turnpike roads (*e*).

The weighing of carts and other carriages is noticed afterwards in considering toll dues.

### *B. Means of Constructing and Repairing Turnpike Roads, by the Toll-Dues.*

The toll-dues collected at the turnpike-gates are the means of maintaining turnpike-roads; the statute labour and the road money being applied exclusively to highways, not being turnpike-roads.

The rates of toll are regulated in different counties by the local acts. But some regulations are made by the general turnpike act (*f*), which, as already noticed, extends to all acts passed or to be passed relative to any turnpike road, except in so far as it may be expressly varied, altered, or repealed by turnpike acts to be passed.

(*a*) 32 Geo. II. c. 15, sect. 11.

(*b*) Ibid. sect. 12.

(*c*) Ibid. sect. 13.

(*d*) Ibid. sect. 14.

(*e*) 4 Geo. IV. c. 49, sect. 37.

(*f*) 4 Geo. IV. c. 49.



(1.) *Restriction on setting up toll-bars.*—No toll-bar is to be erected across, or on the side of any turnpike-road, unless ordered by the trustees at a meeting of which fourteen days public notice has been given in some newspaper usually circulated in the shire or stewartry, or by affixing it on all the toll-bars erected on such road, not farther than six miles from the place where the toll-bar is proposed to be erected, and also on the church doors of the parish within which it is proposed to be erected, and unless a majority of the trustees present sign the order (a).

(2.) *Removing toll-bars illegally erected.*—If trustees erect any toll-bar where they have not power by any act of Parliament to do so, the sheriff or steward, or the quarter sessions of the justices of the peace for the shire or stewartry where the bar is erected, upon complaint in a summary way, are to hear and determine the matter, and to order the bar to be removed (b).

(3.) *Lowering toll-dues and removing bars.*—The trustees of any turnpike-road, at a meeting held for that purpose (of which one calendar month's notice is to be given in writing, to be affixed on all the toll-bars upon such roads, or by advertisement in some newspaper generally circulated in that part of the country) may from time to time reduce the tolls or remove any toll-bar, or grant exemption at it, for such time as a majority, being a quorum, think proper. And they may advance tolls so reduced, but not to exceed the tolls allowed by the turnpike act, and may again erect the toll-bar and collect tolls at it. But where the whole money, borrowed on the sole credit of the tolls granted by such act, has not been discharged, no such reduction, removal, or exemption is to take place without the consent in writing of the persons entitled to three-fourths of the money remaining due upon such respective tolls (c).

It is afterwards noticed, in considering the compounding for tolls, that toll-men are prohibited, under penalties, from lowering tolls.

(4.) *Subscriptions for roads.*—The trustees of turnpike-roads may accept subscriptions for such money as may be requisite for making or maintaining any particular part of the roads; and for securing re-payment with interest may assign the tolls authorised to be levied on any of the roads: and they may contract and agree with the person subscribing, to apply the

(a) 4 Geo. IV. c. 49, sect. 48.

(b) 4 Geo. IV. c. 49, sect. 49.

(c) Ibid. sect. 47.

money subscribed in making and maintaining such parts of such roads (*a*).

If any person who subscribes, after forty days notice given by any person authorised by the trustees to receive the subscription money, neglect or refuse to pay the sum subscribed by him to the person so authorised, such person may sue for it in any court competent in Scotland (*b*).

(5.) *Borrowing money*.—The trustees of every turnpike road may borrow on the credit of the tolls arising on such road, such sum of money as they from time to time think proper, and may assign the tolls on such road, or any part of them, (the expences of which assignation to be paid out of the tolls) as a security to any person who advances such money; of which assignations or form is given in the act. And copies of such assignations are to be entered by the clerk to the trustees in the book of proceedings; and all persons to whom an assignation of tolls is made, or who are entitled to the money so secured, may transfer their interest by indorsation (*c*).

The trustees may borrow on liferent annuities, and assign the toll dues to the lender for the residue of the term for which the toll dues are granted; and such annuity may be transferred by indorsation. Trustees are not to give more than 10 *per cent.* on any sum borrowed on annuity, or to grant such annuity on any life under fifty years (*d*).

Trustees are not personally liable for the repayment of any money borrowed by reason of their having signed the securities; nor to be held personally liable for payment of any sum for which they have not bound themselves personally (*e*).

Proprietors under entail, or their tutors or curators, may burden their estates for money advanced or lent, in certain ways, and under certain qualifications, detailed in the act (*f*).

(6.) *Letting tolls*.—Turnpike trustees, at a meeting appointed for the purpose, may let the tolls by public roup; at which lettings the trustees, or some person authorised by them, may bid; and if no bidder offer, or if they be not let by public roup, they may be let by private tender. But they are not to be let for longer than three years (*g*).

(7.) *Compounding for tolls*.—Turnpike trustees, previous to letting the tolls, may compound for any term not exceeding one year, with any person using such road, which composition is to be paid in advance; and, in default thereof, the composition is to be void; and all such composition money is to be

(*a*) 4 Geo. IV. c. 49, sect. 20.

(*c*) Ibid. sect. 22.

(*f*) Ibid. sect. 25.

(*d*) Ibid. sect. 23.

(*b*) Ibid. sect. 21.

(*e*) Ibid. sect. 24.

(*g*) Ibid. sect. 54.

applied in the same manner as the tolls; but the tacksman or toll-gatherer is not to compound with any person, or to accept any lower tolls than those settled by the trustees, or to pay back or return any money to persons paying the tolls, with the intent of avoiding the provisions of this act or any turnpike act, under a penalty for each offence of twenty pounds (*a*).

The trustees may enter into an agreement with the deputy post-master-general as to the amount of tolls payable for any mail coach travelling along the road, without limitation as to the amount of tolls payable, or the number of years for which the agreement is to subsist (*b*).

It may be proper to notice here the provisions of a former act of Parliament with regard to mail-coaches. By that act, all exemptions from toll granted by any act of Parliament in favour of carriages with more than two wheels, conveying the mail in Scotland, are repealed; and the exemption is limited to carriages with two wheels, conveying only the mail or packet with the driver, and any horses not drawing, employed in conveying the mail or packet (*c*). The mails are not to be stopped at turnpike gates for payment of the tolls; but they are to be paid from the revenue of the post-office, in such manner as may be agreed upon between the trustees of the particular turnpike roads, and the deputy post-master for Scotland, and to be payable once in three months; and if such agreement be not made or performed, the treasurers or clerks of the trustees may pursue the deputy post-master-general summarily before the Court of Session or Court of Exchequer in Scotland (*d*). If any toll-keeper or other person obstruct or delay any carriage or horse conveying the mail or packet at any turnpike gate, for each such offence he forfeits any sum not exceeding five pounds sterling, to be recovered within three months, on proof by confession, or by the oath of one credible witness, before any justice of the peace of the county, stewartry, or place where the offence was committed, or where the offender is or resides, to the use of any person suing for it; to be levied by distress by warrant of the justice; and for want of distress, such justice is to commit the offender to the common gaol of the county, stewartry or place where the offence was committed, for a period not exceeding two calendar months (*e*).

(8.) *Rates of toll*.—Where any carriage with four wheels passes through any toll-bar, affixed to any waggon or cart, it

(*a*) 4 Geo. IV. c. 49, sect. 48.

(*b*) Ibid. sect. 55.

(*d*) Ibid. sect. 4.

(*c*) 53 Geo. III. c. 68. sect. 1, 2, 3.

(*e*) Ibid. sect. 5.

pays toll as if drawn by two horses ; and with two wheels, as if drawn by one horse ; and where any horse is fastened to, but not used in drawing, any waggon, cart, or other carriage, it is not liable to a higher toll than a single horse laden or unladen, as the case may be (*a*).

Horses travelling for hire under the post-horse duty acts, having passed through any turnpike gate, drawing a carriage for which toll was paid, on returning through that gate, or any gate cleared by such payment, either without that carriage, or drawing it empty, and without a ticket denoting a fresh hiring, are to pass toll free, provided they pass before nine o'clock of the following morning (*b*).

Where any horses, " as last aforesaid," that is horses travelling for hire under the post-horse duty acts, pass through any turnpike gate not drawing any carriage and pay toll, and they return drawing any carriage on the same day, or before nine o'clock of the following morning, the toll paid for them on their originally passing is to be deducted (*c*).

Tolls to the amount made payable by any local turnpike act are payable for horses or beasts of draught drawing stage coaches, diligences, caravans, stage waggons, or other stage carriages conveying passengers or goods for pay or reward, are payable every time of passing or repassing (*d*).

Tolls to the amount made payable by any local turnpike act are payable for horses or other beasts of draught let out to hire, and drawing any post chaise or other carriage, every time of passing, whenever a new hiring takes place, and a ticket denoting such hiring is produced (*e*).

Where any owner of any coach, chaise, or such other carriage, and of any waggon, cart, or such other carriage, as is afterwards directed to have the owner's name painted upon it, fails to have his name and place of abode painted in legible characters upon some conspicuous part of such carriage, in manner after directed, the tacksman of the tolls or the toll-gatherer, under a penalty of not exceeding forty shillings for each omission, is to take, at any bar, before such carriage passes, double the tolls otherwise leviable for such carriage (*f*).

The particular rates of toll are regulated by the local acts.

Certain general regulations applicable to the number of beasts of draught for carriages of burden, and broad wheels, affecting the rates of toll, have been noticed in considering the constructing, preserving, and repairing turnpike roads.

(*a*) 4 Geo. IV. c. 49, sect. 34.

(*c*) Ibid. sect. 39.

(*f*) Ibid. sect. 51.

(*d*) Ibid. sect. 40.

(*b*) Ibid. sect. 38.

(*e*) Ibid. sect. 41.

(9.) *Exemptions from toll*.—No toll is to be taken on any turnpike road for any horses or carriages attending his Majesty or any of the Royal Family, or returning therefrom (a).

No toll is to be taken at any toll-bar for any beast of draught, or any carriage carrying, or going empty to carry, or returning empty from carrying, only materials for making or maintaining any turnpike road or highway, or for building or repairing any bridge or toll-house on any turnpike road or highway; or for any beast of draught or carriage employed in carrying, having been employed only in carrying on the same day on the turnpike road on which such gate is placed, any ploughs, harrows, or other implements of husbandry (unless laden also with something not exempted) or any hay, straw, or dung, fodder for cattle, and corn in the straw, or other produce of such farm, from one part of any farm to another; or for horses or other beasts of husbandry going to or returning from plough or harrow, or to or from pasture or watering place, or going to be, or returning from, being shod or farried at their usual smithy; or from any person going to, or returning from, his usual place of religious worship, tolerated by law, on Sundays, or on any day on which divine service is by authority ordered to be celebrated; nor from any clergyman going to, or returning from, visiting any sick parishioner, or on other his parochial duty within his parish; nor is any toll to be exacted within the parish from any person attending, or returning from having attended, the funeral of any person who dies and is buried within the parish; or for any beast of draught or carriage conveying only criminals or vagrants sent by warrants or legal passes, or returning empty; or for any beast of draught or burden, or carriage of whatever description, employed, or to be employed, in conveying the mails of letters and expresses, under the authority of the postmaster-general, either when employed in conveying or guarding them, or in returning, except in so far as they may be specially subjected to toll by 53 Geo. III. c. 68 (which, as before noticed, in considering the compounding for tolls, limits the exemption to carriages with two wheels, conveying only the mail or packet with the driver, and any horses, not drawing, employed in conveying the mail or packet); nor is toll to be taken for the horse of any officers or soldiers on their march, or on duty, or for any horse or other beast, or any waggon, cart, or other carriage, conveying only the arms or baggage of such officers or soldiers, or any sick, wounded, or

(a) 4 Geo. IV. c. 49, sect. 35.

disabled officers or soldiers, or returning empty from having only been so employed; or for any waggon, cart, or other carriage, or any beast of draught, conveying any ordnance, or barrack or commissariat, or other public stores belonging to his Majesty, or for the use of his Majesty's forces, or returning empty from having been so employed (see farther on this point, *Soldiers*, sect. Toll-dues); or for any carriage conveying volunteer infantry, or for any horse furnished by or for any person belonging to any corps of yeomanry or volunteer cavalry or infantry, and ridden by him in going to or returning from any place appointed for and on the days of exercise, inspection, or review, or on other public duty, provided that such person be dressed in the uniform of his corps, and have his arms, furniture, and accoutrements, according to the regulations of such corps, at the time of claiming the exemption; or for any horses or carriages which only cross any turnpike-road, or do not pass above one hundred yards upon it. But, if any person, by any fraudulent or collusive means, claim or take the benefit of any of those exemptions, not being entitled to it, he forfeits a sum not exceeding five pounds, to be applied to the use of the road; and in all cases the proof of exemption is upon the person claiming it. And nothing contained in this clause is to effect the exemptions in any lease of tolls executed under any local act, prior to the passing of this act (4th July 1823) in such cases where tolls have been let subject to fewer or less exemptions than those hereby granted (a).

(10.) *Table at toll-bars. Tickets.*—Turnpike trustees are to put up and continue at every toll-bar a printed schedule or table, containing the name of the toll-bar, with a list of the tolls payable at it, and also the name of any other bar cleared by payment at it; and are to provide tickets denoting the payment of toll, and mentioning the bar so cleared; one of which tickets is to be delivered to the person paying the toll, and is to have printed or written on it the day of the month on which it is delivered; and on the production of such ticket at any bar cleared by payment at the bar where it was delivered, the person producing it is to pass without paying. But if no such schedule or table be put up at a toll-bar, toll cannot be collected at it (b).

(11.) *Evading toll.*—Any person taking off any beast of draught from any coach, chaise, waggon, cart, or carriage, at or before coming to any toll-bar, and putting it on after pass-

(a) 4 Geo. IV. c. 49, sect. 36.

(b) Ibid. sect. 42.

ing the bar, with intent to avoid any toll payable, or penalty imposed by this or any turnpike act, on conviction before the sheriff, steward, or any justice of the peace for the shire or stewartry where the offence was committed, upon oath of one credible witness, or other competent evidence, forfeits a sum not exceeding forty shillings for each offence (*a*).

If any person, with any horse, cattle, beast, or carriage, pass from any turnpike-road, over any land near or adjoining to it (not being a public highway) such person, not being the proprietor or occupier, or servant, or one of the family of the proprietor or occupier of the land, with intent to evade the payment of the tolls granted by any act of parliament; or if any such proprietor or occupier knowingly or willingly permit any person, under those exceptions, so to pass, with such intent; or if any person, other than the toll-gatherers, give, or if any person receive from any person other than the toll-gatherers, or forge, counterfeit, or alter any note or ticket, directed to be given, with intent to evade the payment of the tolls; or if any person fraudulently or forcibly pass through any toll-bar, or leave, before coming to any toll-bar, any horse, cattle, beast, or carriage, whatsoever, in consequence of which the payment of any tolls or duties is avoided or lessened; or if any person do any other act whatever, in order to evade the payment of any of the tolls, and by which they are evaded; every such person, for every such offence, forfeits any sum not exceeding five pounds (*b*).

(12.) *Weighing*.—Turnpike trustees may erect weighing machines on any convenient part of any turnpike-road, and may direct all loaded waggons, carts, or other carriages, coming within a hundred yards of the machines, to be weighed (*c*).

Where turnpike-roads under different trustees meet, they may fix upon a place for erecting a weighing machine, and may proportion the expence of maintaining it, and the forfeitures for overweight, among the turnpike-roads as may appear proper (*d*).

If any person unload or cause to be unloaded any goods from any beast of burden, waggon, cart, or other carriage, at or before coming to any toll-bar or weighing machine, or load upon such beast of burden or carriage, after passing any toll-bar or weighing machine, any goods taken from any beast of burden or carriage, belonging to, or hired or borrowed by any person, in order to avoid the payment of the tolls payable for overweight, on conviction before the sheriff, steward, or any jus-

(*a*) 4 Geo. IV. c. 49, sect. 27.

(*c*) Ibid. sect. 28.

(*b*) Ibid. sect. 45.

(*d*) Ibid. sect. 32.

tice of the peace for the shire or stewartry where the offence was committed, upon the oath of one credible witness or other competent evidence, he forfeits a sum not exceeding forty shillings for each offence (*a*).

Any owner or driver turning out of the way to avoid weighing, on conviction of every such offence before the sheriff or steward, or any justice of the peace of the shire or stewartry where the offence is committed, upon the oath of one credible witness, or other competent evidence, forfeits, if he be the owner, a sum not exceeding five pounds, and if he be the driver and not the owner, any sum not exceeding forty shillings (*b*).

The keeper of every toll-bar where a weighing machine is erected, or any other person appointed to the charge of such weighing machine, is to weigh all waggons, carts, or other such carriages which pass loaded through such bars respectively, and which he believes to carry greater weights than are allowed to pass without paying additional toll: and if he knowingly permit such carriage to pass with weight for which additional toll is due, without weighing and receiving the additional toll, he forfeits a sum not exceeding five pounds. And, if the owner or driver refuse to allow it to be weighed, or resist any toll-keeper or toll-gatherer in weighing it, he forfeits a sum not exceeding five pounds (*c*).

Any trustee or surveyor who suspects such connivance, or neglect, may cause any such carriage which has passed through a toll-bar where a weighing machine is erected, and has not passed above two hundred yards beyond the toll-bar, to return with the loading to be weighed, in the presence of such trustee or surveyor; upon requiring the driver to drive back and tendering to him one shilling for doing so, which is to be returned if the carriage be found above the weight allowed to pass without additional toll. And if the driver neglect or refuse, he forfeits a sum not exceeding forty shillings; and any peace officer or other person present may drive the carriage back to the weighing machine to be weighed (*d*).

(13.) *Recovering of tolls, and settlement of disputes.*—If any person subject to the payment of toll, after demand, wilfully neglect or refuse to pay, the person authorized to collect such tolls, taking such assistance as may be necessary, may seize and pound any horse, beast, cattle, carriage, or other thing, upon or in respect of which any such toll is imposed, or any carriage in respect of the horses or other beasts of draught drawing the carriage on which such toll

(*a*) 4 Geo. IV. c. 49, 29.

(*c*) Ibid. sect. 30.

(*b*) Ibid. sect. 33.

(*d*) Ibid. sect. 31.



is imposed, or any of the goods or effects of the person so neglecting or refusing to pay (except the bridle or reins of any horse or other beast separate from the horse or beast); and if the toll, and the reasonable charges of such seizure and poinding, be not paid within four days after such seizure and poinding, the person so seizing and poinding may, with the authority of the sheriff, steward, or any justice of the peace for the shire or stewartry, sell by public roup any horse, beast, cattle, carriage, or thing so seized and poinded, or a sufficient part thereof, returning the surplus of the money (if any) arising from such sale, and what shall remain unsold, to the owner thereof, after such tolls, and the reasonable charges occasioned by such seizure, poinding, and sale, are deducted (*a*).

If any dispute arise about the amount of the tolls due, or the expences of keeping or selling any articles poinded for non-payment of any tolls, the toll-gatherer, or the person poinding, may retain such articles, or the money arising from the sale thereof (as the case may be) until the amount of the tolls due, and the expences of keeping and selling the articles, be ascertained by the sheriff or steward, or any justice of the peace for the shire or stewartry wherein the toll-bar at which the toll in dispute is payable is situate, who, upon complaint made for that purpose, are, in a summary manner, to determine the amount of the tolls due, and to adjudge such expences to either party as shall appear proper (*b*).

(14.) *Regulations for toll-men.*—Every toll-gatherer is to place on some conspicuous part of the front of the toll-house his or her Christian and surname, painted in black on a board with a white ground; each of the letters of such name to be at least two inches in length, and of a breadth in proportion; and such board is to remain at the toll house during the whole of the time that the person whose name is expressed on it is on duty; and every tacksman or toll-gatherer is to place on the front of the toll-house the printed schedule or table before directed to be provided by the Trustees; and if any tacksman or gatherer do not place such board or schedule or table respectively, and keep them there during the time such person is such tacksman or gatherer, or demand or take a greater or less toll than such tacksman or gatherer is authorised to do, or demand or take a toll from any person exempted from payment, and who claims such exemption, or refuse to permit any person to read such board, schedule, or table, or refuse to tell his or her Christian and surname to any person who shall de-

(*a*) 4 Geo. IV. c. 49, sect. 43.

(*b*) Ibid. sect. 44.

mand it, on being paid the tolls, or give a false name, or refuse or neglect to give a ticket denoting the payment of the tolls, and naming and specifying the several toll bars freed by such payment, or, upon the legal toll being paid or tendered, unnecessarily detain or wilfully obstruct any passenger from passing through any toll bar, or make use of any scurrilous or abusive language to any trustee, surveyor, traveller, or passenger, or offend against the provisions of any turnpike act, or of this act, such person forfeits any sum not exceeding five pounds for every such offence (a).

If any toll gatherer, or person acting as such, offend against any of the provisions of any turnpike act or of this act, by which any penalty is incurred, and abscond or absent himself or herself so as not to be found, the sheriff or steward, or any justices of the peace before whom any such toll gatherer or person is convicted of any such offence, may order that the penalty incurred be paid by the tacksman of the tolls under whom such gatherer or other person acts; all which penalties are to be levied, recovered, and applied as after mentioned (b).

4. *Preserving order on turnpike roads, against interruption, annoyance, or injury.*

(1.) *Laying materials, rubbish, &c. upon roads or streets.*—If any person lay any timber or stones (excepting timber, stones, and other materials for building or repairing any houses or walls immediately adjoining the sides of any turnpike road, and which may occupy one-fourth part of such road only), or any dung, ashes, rubbish, scourings of ditches, or any other matter, upon any turnpike road, or upon any street of any town or village which forms a part of such turnpike road, and which is maintained by the trustees of such road, or upon the side drains or ditches thereof, he forfeits any sum not exceeding five pounds; and the trustees or their surveyor, or other person appointed by them, may, *brevi manu*, seize and carry off any such matter, and dispose of it as the trustees direct: And when the proprietor or occupier of any lands or houses immediately adjoining any turnpike road, lays down any materials for building or repairing any house or wall, he is to erect such fence round such materials, and to fix and light lamps thereon as the trustees may require; and, on failing to comply with such requisition, he forfeits any sum not exceeding five pounds for every day he continues to offend (c).

(a) 4 Geo. IV. c. 49, sect. 52.

(b) *Ibid.* sect. 53.

(c) *Ibid.* sect. 54.

(2.) *Riding, &c. on footpaths.—Damaging roads.—Bonfires and fireworks.—Leaving carriages.—Leaving rubbish, &c.*

—If any person ride upon any footpath or causeway by the side of any turnpike road, made or set apart for the use of foot passengers, or lead or drive any horse, ass, mule, swine, or cattle, or carriage of any description, or any wheelbarrow, truck, or sledge, or any single wheel of any waggon, cart, or carriage apart therefrom, upon any such footpath or causeway, or cause any injury or damage to be done to it, or the hedges, posts, rails, or fences thereof, or wilfully pull down or damage any bridge, wall, or any other building or erection made by the trustees or commissioners of any turnpike road, or repaired or repairable by them, or haul or draw, or cause to be hauled or drawn, upon any part of such turnpike road, any timber, stone, or other thing, otherwise than upon wheeled carriages, or suffer any timber, stone, or other thing which is carried principally or in part upon wheeled carriages, to drag or trail upon such road to the prejudice thereof; or use any tipstick, joggle, or other instrument for the purpose of retarding the descent of any cart or other carriage down any hill, in such manner as to destroy, injure, or disturb the surface of any turnpike road; or in or upon such road, or by the side thereof, or in any exposed situation near thereto, kill, slaughter, singe, scald, burn, dress, or cut up any beast, swine, calf, lamb, or other cattle; or if any person driving any horse or other beast on the said road, carrying any iron bar or rod, basket, or pannier, or any other thing, shall place it, so that any part of it projects more than thirty inches from the side of such horse or other beast, or so as in any manner to obstruct or impede the passage of any person, or any horse, beast, or carriage travelling along such turnpike road; or if any hawker, higgler, gipsy, or other person travelling with any machine, vehicle, cart, or other carriage, with or without any horse, mule, or ass, pitch any tent, or encamp upon or by the sides of any part of any turnpike road; or if any blacksmith, or other person occupying a blacksmith's shop situate near any turnpike road, and having a window or windows fronting the said road, do not, by good and close shutters every evening after it becomes twilight, bar and prevent the light from such shop shining into or upon the said road; or make or assist in making any fire or fires commonly called bonfires, or set fire to or wantonly let off or throw any squib, rocket, serpent, or other firework whatsoever, within eighty feet of the centre of such road; or bait or run for the purpose of baiting any bull, or play at foot ball, tennis, fives, cricket, or any other game,

upon such road, or on the side or sides thereof, or in any exposed situation near thereto, to the annoyance of any passenger or passengers; or if any person leave any waggon, wain, cart, or other carriage whatever upon such road, or on the side or sides thereof, without any proper person in the sole custody or care thereof, longer than may be necessary to load or unload the same, except in cases of accident, and, in cases of accident, for a longer time than may be necessary to remove the same, or do not place such waggon, wain, or other carriage during the time of loading or unloading the same, or of taking refreshment, as near to one side of the road as conveniently may be, either with or without any horse or beast of draught harnessed or yoked thereto; or lay any timber, stone, hay, straw, dung, manure, soil, ashes, rubbish, or other matter or thing whatsoever upon such road, or on the side or sides thereof, or the footpaths or causeways adjoining, to the prejudice of such road or footways, or to the prejudice, annoyance, interruption, or personal danger of any person or persons travelling thereon; or suffer any water, filth, dirt, or other offensive matter or thing whatsoever to run or flow into or upon such road or footpaths from any house, building, erection, lands, or premises adjacent thereto; or if any person driving any pigs or swine upon such road suffer such pigs or swine to root up or damage such road, or the fences, hedges, banks, or copse on either side thereof; or if any person, after having blocked or stopped any cart, waggon, or other carriage in going up a hill or rising ground, cause or suffer to be or remain on such road the stone or other thing with which such cart or other carriage has been blocked or stopped; or if any person or persons pull down, damage, injure, or destroy any lamp or lamp post put up, erected, or placed in or near the side of any turnpike road or toll house erected thereon, or extinguish the light of any such lamp, every person offending in any of those cases, for each and every such offence, forfeits any sum not exceeding forty shillings over and above the damages occasioned by it. (a).

(8.) *Surveyors, &c. leaving materials, &c.*—If the surveyor or of the trustees of any turnpike road, or any contractor or other person in their employment, lay on any part of any such road any heap of stones or other materials for the repair thereof, and permit the same to remain longer than necessary for the breaking and spreading of such materials, or lay on any such road any thing, or knowingly permit to remain on any part of any such road, any thing which may endanger the safe-

(a) 4 Geo. IV. c. 49, sect. 90.

ty of any passenger, or dig any pit, or make any cut on any turnpike road, without sufficiently fencing it, such person, for each such offence, forfeits and pays a sum not exceeding five pounds over and above the damages occasioned by it, and expences. And any person travelling along any turnpike road may prosecute the offender in manner after mentioned (*a*).

(4.) *Proprietors to fence pits, &c.*—If the proprietor or occupier of any lands adjacent to any turnpike road dig any pit or make any cut upon or within twelve feet of the side of any such road, and leave it unfenced, so as to be dangerous to travellers, and do not fence it when required by the trustees of such road, or the procurator-fiscal of the shire or stewartry within which the pit or cut is situated, such proprietor or occupier forfeits and pays any sum not exceeding five pounds for every day the pit or cut continues to be unfenced after the elapse of three days after being so required. And the trustees or procurator-fiscal may then order it to be fenced at the expence of such proprietor or occupier, to be recovered as other penalties by this act (*b*).

(5.) *Animals pasturing or straying on roads.*—If any horse, cattle, ass, sheep, swine, or other beast of any kind, be pastured, or left or found straying on any turnpike road, or the sides of it where it is inclosed (except on such parts of any road as lead or pass through or over any common or waste or unin-closed ground), any trustee of such road, or the surveyor of such trustees, or any other person authorized by them, may, *brevi manu*, seize and detain it, until the owner thereof for every such animal pay a sum not exceeding five shillings and expences; and in case the penalty and expences be not paid within three days after notice of such detention has been given on the two nearest toll-bars on the road where such animal was found, the surveyor or other person is to sell it by authority of the sheriff, steward, or any justice of the peace for the shire or stewartry; and, after deducting the amount of the penalty and expences, is to pay the surplus, if any, to the owner of such animal (*c*).

(6.) *Side-ridges to be made in ploughing.*—Every person, in ploughing any uninclosed land adjoining any turnpike road, is to make hedge-ridges along the sides of such road of the breadth of twelve feet at the least, under a penalty not exceeding five pounds, to be levied as other penalties by this act (*d*).

(7.) *Gates to open inwards.*—No gate of any park, field, or

(*a*) 4 Geo. IV. c. 49, sect. 92.

(*c*) Ibid. sect. 94.

(*b*) Ibid. sect. 93.

(*d*) Ibid. sect. 95.

inclosure whatsoever, is to be made to open into or towards any part of any turnpike road, or of any footpath belonging thereto, or be suffered so to open, except the hanging post thereof shall be fixed or placed so far from the centre of any part of such turnpike road, as that no part of such gate shall, when open, project over any part of such turnpike road, or any footpath belonging thereto; and the occupier of any park, field, or inclosure, having any gate opening outwards, contrary to the meaning of this act, must, within six days after notice to him or her given, either personally or in writing, from the trustees of any turnpike road, or their surveyor, cause such gate to be hung so that no part of the gate, when open, shall project over any part of such turnpike road, or any footpath belonging thereto; and if such occupier fail so to do, the surveyor of any such turnpike road is to cause the gate to be hung as before directed, and charge the expence of making such alteration and hanging such gate against the occupier, who also forfeits a further sum not exceeding five pounds for such neglect, to be fixed by the sheriff, steward, or any two justices of the peace for the shire or stewartry in which such gate is situated (a).

(8.) *Cutting roads.*—It seems proper to notice here an obligation imposed upon trustees, for the sake of the lands adjoining to the road. The trustees of every turnpike road are to cut all weeds growing on it, or the sides of it when enclosed, at a proper season, to prevent the weeds from coming into seed; and if they fail to do so, for eight days after being required by the proprietor or occupier of the adjoining lands, by notice in writing to the clerk or surveyor, the proprietor or occupier may cut the weeds, and charge the expence against the trustees, and recover it as penalties under this act *mutatis mutandis* (b).

(9.) *Placing wind-mills, water-mills, lime-kilns, and skinner's washing ponds.*—No person is to erect any wind-mill, water-mill, or lime-kiln within the distance of one hundred yards from any part of any turnpike road, under the penalty of five pounds for every day such wind-mill, water-mill, or lime-kiln continues, unless it be so placed or screened as to prevent damage or detriment to any traveller on such turnpike road; nor is any person to place any skinner's washing pond within the distance of one hundred yards from any part of any turnpike road, under a penalty not exceeding five pounds for every day any such nuisance continues. But that provision does not render legal the re-erection or continuance of any wind-mill, water-mill, lime-kiln, or skinner's washing pond, in any

(a) 4 Geo. IV. c. 49, sect. 96.

(b) Ibid. sect. 97.

case where, by the common law, it is a public or private nuisance (a).

(10.) *Owners of waggons and carriages, &c. to have their names painted.*—The owner of every waggon or cart, and also of every coach, post chaise, or other carriage, let either in the whole or in part to hire, is to paint in a straight line, upon some conspicuous part on the off or right side of his waggon or cart, and upon the pannels of the doors of all such coaches, post chaises, or other carriages, before they are used upon any turnpike road, the Christian and surname, and place of abode of such person, or the Christian and surname, and place of abode of the principal partner or owner thereof, in large legible Roman letters, either of a dark colour on a light ground, or of a light colour on a dark ground, not less than one inch in height, with numbers, beginning with number one, where more of such carriages respectively than one belong to the same owner, and proceeding in regular progression, and continue the same thereupon so long as such carriages are used upon any turnpike road; and every owner of any such carriage using or allowing it to be used upon any turnpike road without the names and descriptions painted on it as aforesaid, or who paints or causes to be painted, any false or fictitious name or place of abode on such carriage, forfeits for every such offence a sum not exceeding five pounds; and every person driving any coach or post chaise let for hire, waggon, cart, or other carriage, without the name or description of the owner painted thereon as before directed, or with a false or fictitious name, or with the name painted in inverted characters, or placed in an inverted position, or who refuses to stop and permit such name to be read by any person requiring him so to do, forfeits for each such offence any sum not exceeding forty shillings, to be recovered as other penalties by this act (b).

(11.) *Riding on carts, &c.—Passing other carriages.*—If the driver of any carriage used for carrying goods on any turnpike road ride on the shafts or on any other part of such carriage, without having some person guiding the beasts of draught drawing it, or without having or holding double reins attached to each side of the bridle of each beast of draught drawing it; or if the person driving any sort of carriage do not keep to the left or near side of such road on meeting, or on being overtaken by any other carriage, or if such person wilfully prevent any other person from passing him; such person, for every such offence, forfeits any sum not exceeding

(a) 4 Geo. IV. c. 49, sect. 100.

(b) Ibid. sect. 101.

five pounds, over and above the damages occasioned by it, and expences (a).

(12.) *Regulations for one person driving two carts.*—One person may drive two carts on any turnpike road, if the hinder cart be not drawn by more than one horse, and if the horse of it be attached by a rein to the back of the foremost cart, and follow in the same line, and be not farther from the foremost cart than four feet; and if the horse be not so attached, the driver forfeits a sum not exceeding forty shillings, to be recovered as other penalties by this act (b).

(13.) *Age of driver of cart.*—No waggon or cart is to be driven on any turnpike road by any person not of the full age of thirteen years, under a penalty not exceeding forty shillings for each offence, to be paid by the owner (c).

Regulations for toll-men and toll-gatherers were noticed in considering toll dues. The restriction against their selling spirituous liquors was noticed in considering the officers of the trustees.

*5. Judicial procedure and other provisions for enforcing the general turnpike act and local turnpike acts.*

(1.) *Penalty on witnesses not attending.*—If any person be summoned as a witness to give evidence before any sheriff or steward, or before any justice of the peace, regarding any matter relating to or contained in any act of Parliament relating to turnpike roads or this act, either on the part of the prosecutor or the person accused, and refuse or neglect to appear at the time and place appointed, after having been paid or tendered a reasonable sum for his or her expences, without a reasonable excuse for such refusal or neglect, such person forfeits for every such offence any sum not exceeding five pounds (d).

(2.) *Punishing persons resisting the execution, assaulting collectors, or passing tolls, &c.*—If any person resist or forcibly oppose any person employed in the due execution of this act, or any act made for making or maintaining any turnpike road, or assault any surveyor or any tacksman or toll-gatherer in the execution of his office, or pass through any toll-bar or fence set up under the authority of any act of Parliament for making or maintaining any turnpike road, without paying the toll, or make any rescue of cattle or other goods dis-

(a) 4 Geo. IV. c. 49. sect. 91.

(c) Ibid. sect. 103.

(b) Ibid. sect. 102.

(d) Ibid. sect. 105.



trained by virtue of this act, or of any act for making and maintaining any turnpike road, every such person for every such offence forfeits any sum not exceeding five pounds, at the discretion of the sheriff, steward, or justices of the peace before whom he is convicted. (*a*)

(3.) *Securing transient offenders*.—As offences may be committed against this act, or other acts for making and maintaining turnpike roads, by persons unknown to the toll-gatherers or other officers, any of the trustees of any turnpike road, or any of their clerks or their toll-gatherers, surveyors, or other officers, respectively, and such other person as any of them may call to their assistance, without any warrant or other authority than this act, may *brevi manu* seize and detain any unknown person who commits any offence either prohibited by this act, or by any act of Parliament for making or maintaining any turnpike road, and take such person before the sheriff, steward, or nearest justice of the peace for the shire or stewartry where the offence has been committed, or where such offender is seized and apprehended, who is forthwith to examine and discharge or to commit such person till caution *de judicio sists* be found, as the case may require (*b*).

(4.) *Recovery and application of expence, toll duties, penalties, &c.*—The trustees of every turnpike road, at any general or adjourned meeting, may direct prosecutions to be raised against the offender for any nuisance or other offence committed upon the road, at the expence of the turnpike funds, to be allowed by the trustees at some subsequent meeting (*c*).

Every person who prosecutes for any expence, toll duty, penalty, forfeiture, or fine imposed by this or any act of Parliament made for making or maintaining any turnpike road, for the recovery of which no particular mode is directed, is to prosecute for it before the sheriff or steward, or the justices of the peace of the shire or stewartry in which such penalty, forfeiture, or fine has been incurred, or where the offender resides, subject to appeal in manner after mentioned (*d*).

No trustee appointed under any turnpike act, who is in the commission of the peace, is disqualified from acting as a justice of the peace in the execution of any such act, by reason of his being such trustee (*e*).

All expences, and also all penalties, forfeitures, and fines by this act directed to be paid or inflicted, (the manner of levying, recovering, and applying of which is not otherwise di-

(*a*) 4 Geo. IV. c. 49, sect. 106.

(*c*) Ibid. sect. 104.

(*d*) Ibid. sect. 108.

(*b*) Ibid. sect. 107.

(*e*) Ibid. sect. 6.

rected in this act) are, upon proof before the sheriff, steward, or any two justices of the peace for the shire or stewardry where the offence has been committed, or where the offender may reside (as the case may require), either by the confession of the party offending, or by the oath of any credible witness, or other competent evidence, to be levied, together with the expences attending the information and conviction, by poinding and sale of the goods and effects of the party offending, by warrant under the hand of such sheriff, steward, or justices, and the surplus (if any) after deducting such expences, penalties, forfeitures, and fines, and the charges of such poinding and sale, are to be returned to the owner; and in case such expences, fines, penalties, and forfeitures, be not forthwith paid upon conviction, such sheriff, steward, or justices may order the offender to be detained and kept in safe custody until return can be conveniently made to such warrant of poinding, unless the offender give sufficient security, to the satisfaction of such sheriff, steward, or justices, for his or her appearance before such sheriff, steward, or justices, on such day as may be appointed for the return of such warrant of poinding; which security the sheriff, steward, or justices, are hereby empowered to take by bond of caution or otherwise; but if upon the return of such warrant it appear that no sufficient goods and effects can be found, the sheriff, steward, or justices, are, by warrant under their hand, to cause the offender to be committed to the common gaol or house of correction of the shire or stewardry where the offender is or resides, there to remain for any time not exceeding three months, unless such expences, penalties, forfeitures, and fines, and all reasonable charges attending the same, be sooner paid; and the monies recovered or levied for such expences are to be applied to the payment of the same respectively; and the monies arising by such penalties, forfeitures, and fines respectively, when paid, if not otherwise directed to be applied by this act, or the act under which they have been incurred, are to be paid to the trustees for making and maintaining the road on which such offence has been committed, or to their treasurer, and applied and disposed of for the purposes of the said road (*a*).

In recovering the different penalties imposed by this act or any turnpike act, the sheriff, steward, or justice before whom any complaint for the recovery thereof may be brought, may proceed, if under all circumstances there shall be cause, in a summary way, and may grant warrant for bringing the parties

(*a*) 4 Geo. IV. c. 49, sect. 109.

complained upon before them for examination; and on confession or probation by the oath of any credible witness or other competent evidence, may proceed to determine thereon, without any written pleadings or record of evidence; but a record is to be preserved of the charge and of the judgment pronounced (a).

(5.) *Appeal to quarter sessions.*—Any person who thinks himself aggrieved by any proceedings before any justice or justices of the peace in the execution of this act, for which no particular relief has been provided by this act, may within six months after the matter complained of is done, but not afterwards, appeal to the justices of the peace at the quarter sessions of the shire or stewartry where the cause of complaint has arisen, the appellant giving fifteen days previous notice of such appeal to the defender or defenders, and to the clerk of the said trustees, and the clerk of the justices of the peace, which justices have authority to hear and determine the matter in dispute, and their judgment therein is to be final, without being subject to review by advocacy, suspension, reduction, or otherwise (b).

(6.) *Judgment of sheriff, steward, or justices, to be final.*—Where by this act the adjudging of any penalty, forfeiture, fine, or any other matter, is committed to the sheriff, steward, or the justices of the peace, assembled in their quarter-sessions, of the several shires and stewartries in Scotland, the judgment of such sheriff, steward, or justices so assembled, is final and conclusive, and is not subject to review by advocacy or suspension, or by reduction, or by any process of law whatever (c).

(7.) *Prosecutions to be brought within six months.*—All prosecutions for the penalties, forfeitures, and fines imposed by this act or any turnpike act, or for any wrongs done or injuries suffered in any matter relating thereto, or for any thing done in pursuance of any of the powers given by this act or any turnpike act, are to be commenced within six months after the penalty, forfeiture, or fine, is incurred, or wrong done, or injury suffered, or fact committed, and not afterwards (d).

### III. FORMS OF PROCEEDINGS.

#### 1. *Complaint for breach of the general regulations applicable to highways not being turnpike-roads.*

[As noticed in the text, however, those general regulations are usually more or less superseded by local acts.]

(a) 4 Geo. IV. c. 49, sect. 110.  
(c) Ibid. sect. 112.

(b) Ibid. sect. 111.  
(d) Ibid. sect. 113.

" At , , 182 .

" Unto the honourable his Majesty's justices of the peace  
" for the county of

" A B, procurator-fiscal of ' court for the public interest,"  
[Any person aggrieved may be the complainer]

" Humbly complains,

" That C D," [design him] " has contravened the act of  
" Parliament of the twelfth year of King George the Third,  
" chapter forty-fifth, for regulating highways, by" [insert the  
particulars, time, and place of the offence] " and has therefore  
" incurred the penalties prescribed by the said act applicable  
" to that offence.

" May it therefore please your honours to impose those pe-  
" nalties upon the said C D, and to grant warrant for le-  
" vying them, and to proceed otherwise in terms of law,  
" and of the said act of Parliament."

" According to justice, &c.

" A B, P. F."

[The name of the offender and the particulars of the offence  
are usually furnished from returns made by the constables, or  
other officers, of the summonses which they have given].

2. *Warrant to apprehend absent offenders against the general  
regulations for highways, not being turnpike-roads.*

" At , , 182 .

" The justice having considered the foregoing complaint  
" against C D, who has not appeared, grants warrant to con-  
" stables to apprehend him, and to take him before any one or  
" more of the justices of this county, to answer to the com-  
" plaint."

" G H, J. P."

[But, as noticed in the text, offenders may, in certain cir-  
cumstances, be apprehended without a warrant.]

[It has been noticed in *Process*, sect. Criminal Cases, that  
even small penalties for offences against road acts, cannot be  
imposed in absence].

*3. Sentence for breach of general regulations for highways, not being turnpike-roads.*

“ At , , 182 .

“ The justice having considered the foregoing complaint, and having heard the said C D, defender, finds the complaint admitted by him ;” [or] “ having heard the said C D, defender, and the proof adduced, finds the complaint proved against him ; and, therefore, finds him liable in the penalty of the said act, which is modified to the sum of sterling ; and ordains him to make immediate payment of that sum to the complainer, to be applied by him in terms of law ; with certification,” [or] “ finds the complaint not proved, and, therefore, dismisses it.”

“ G H, J. P.”

*4. Warrant to sell detained effects, upon sentence for breach of the general regulations for highways, not being turnpike roads.*

[If the fine be not immediately paid, and if horses, carts, &c. belonging to the offender, have been seized, he is liberated. And, after the expiry of 24 hours from the date of the sentence (if the fine have not been paid, or sufficient security found for it in the mean time) warrant may be granted, in the following terms, for the sale of the subjects detained. If security be proposed, the justice will judge of it. If any subjects have been detained which do not belong to the defender, they are returned to the lawful owner].

“ At , , 182 .

“ The justice, in respect the before designed C D, defender, has failed to pay, or to find sufficient security for the fine imposed upon him by the preceding sentence, within twenty-four hours after it was pronounced, grants warrant to constables to sell by public roup the” [specify the subject] “ belonging to the offender, which was detained, to an amount sufficient to pay the said sum, the expences of sale, and the expence of keeping the said subject, which shall be afterwards ascertained by the justice ; for which purpose appoints the constable to report the proceeds of the sale, with the expences of the sale and of keeping the subject detained.”

“ G H, J. P.”

*5. Report of sale by the constable, for breach of the general regulations for highways, not being turnpike-roads.*

[Upon this the constable may return some such report as the following].

“ At , 182 .

“ In virtue of the preceding warrant, I, L M, constable,  
 “ this day sold the subject therein mentioned, by public roup ;  
 “ and the proceeds of the sale amounted to sterling ;  
 “ the expences of sale to sterling ; and the expences  
 “ of keeping the subject to sterling.”  
 “ L M, Constable.”

*6. Warrant for payment for breach of the general regulations for highways, not being turnpike-roads.*

“ At , 182 .

“ The justice finds that the proceeds of the sale amount to  
 “ sterling, and that the expences of sale amount  
 “ to sterling, and the expence of keeping the sub-  
 “ ject, to sterling ; and grants warrant to the con-  
 “ stable to pay the proceeds of the sale, to the amount of the  
 “ fine imposed, and of the said expences, to the before design-  
 “ ed A B, complainer, to be applied in terms of law ; and to  
 “ pay the overplus, amounting to the sum of  
 “ sterling, to the before designed C D, defender”.  
 “ G H, J. P.”

*7. Warrant to imprison for breach of the general regulations for highways, not being turnpike-roads.*

[If no subjects belonging to the offender have been detained, or only subjects not sufficient to pay the sum awarded, the following warrant may be granted immediately upon sentence being pronounced, if the fine be not immediately paid, or satisfactory security found for payment].

“ At , 182 .

“ The justice in respect that the before designed C D has  
 “ failed immediately to pay, or to find sufficient security for  
 “ the fine imposed upon him by the preceding sentence, and

“ that no subjects belonging to him, sufficient to pay the same,  
 “ have been detained, grants warrant to constables to incarce-  
 “ rate him in the tolbooth of , the keepers whereof  
 “ are hereby ordered to receive and detain him until the said  
 “ fine shall be paid, or satisfactory security shall be found for  
 “ it, or until the expiration of from this date.”  
 “ G H, J. P.”

[It is often expedient, especially in remote situations, to detain the offender in a temporary manner (without sending him to gaol) till he shall procure money to pay the fine, or shall make such an arrangement as to satisfy the justice that the fine will be paid].

8. *Complaint for breach of the general regulations applicable to turnpike-roads.*

“ At , 182 .

“ Unto the honourable his Majesty's justices of the peace  
 “ for the county of ,

“ The petition of A B, procurator-fiscal of court for the  
 “ public interest,” [Any person may be the complainer]

“ Humbly sheweth,

“ That C D,” [design him] “ has contravened the act of  
 “ Parliament of the fourth year of King George the Fourth,  
 “ chapter forty-ninth, for regulating turnpike-roads, by” [insert the particulars, time and place of the offence] “ and has,  
 “ therefore, incurred the penalties and charges prescribed by  
 “ the said act, applicable to that offence.”

“ May it therefore please your honours to impose those pe-  
 “ nalties and charges upon the said C D, and to grant  
 “ warrant for levying them, and to proceed otherwise in  
 “ terms of law, and of the said act of Parliament.”

“ According to justice,” &c.

“ A B, P. F.”

[The name of the defender and the particulars of the offence are usually furnished from returns by the constables, or other officers, of the summonses which they have given].

9. *Warrant to apprehend absent offenders against the general regulations for turnpike-roads.*

" At , , 182 .

" The justices having considered the foregoing complaint against C D, who has not appeared, grant warrant to constables to apprehend him, and to take him before any two or more of the justices of this county, to answer to the complaint."

" G H, J. P."

" J K, J. P."

[But, as noticed in the text, offenders may, in certain circumstances, be apprehended without a warrant].

[It has been noticed in *Process*, sect. Criminal Cases, that even small penalties for offences against road acts cannot be imposed in absence].

10. *Sentence for breach of the general regulations for turnpike-roads.*

" At , , 182 .

" The justices having considered the foregoing complaint, and having heard the said C D, defender, find the complaint admitted by him" [or] " having heard the said C D, defender, and the proof adduced, find the complaint proved against him, and, therefore, find him liable in the penalty of the said act, which is modified to the sum of sterling, and in the sum of sterling, for charges ; and ordain him to make immediate payment of those sums to the complainer, to be applied by the complainer in terms of law," [or] " find the complaint not proved ; and, therefore, dismiss it."

" G H, J. P."

" J K, J. P."

11. *Warrant of poinding and sale upon sentence for breach of the general regulations for turnpike roads.*

" At , , 182 .

" The justices, in respect that the before designed C D, defender, has failed to make immediate payment of the before mentioned sums imposed upon him, appoints the said sums



“ to be levied by pointing and sale of the goods and effects of  
 “ the said defender, with the expences of pointing and sale ;  
 “ grant warrant to constables to that effect ; and appoints them  
 “ to make a return upon this warrant of pointing to the jus-  
 “ tices at \_\_\_\_\_, upon the \_\_\_\_\_ day of \_\_\_\_\_ at  
 “ \_\_\_\_\_ o’clock noon ; and grant warrant to constables to detain  
 “ the defender in safe custody until he be taken and there  
 “ brought by them before the justices, or until he find sufficient  
 “ security to the satisfaction of the justices that he will, then  
 “ and there, present himself before them ; and, for that purpose,  
 “ grants warrant to constables to incarcerate him in the tol-  
 “ booth of \_\_\_\_\_ ; the keepers whereof are hereby or-  
 “ dered to receive and detain him accordingly.”

“ G H, J. P.”

“ J K, J. P.”

[It is often expedient, especially in remote situations, to detain the offender in a temporary manner (without sending him to gaol) till he shall procure money to pay the fine and charges, or shall find some person to be cautioner for his appearance at the time and place appointed].

12. *Report of sale by the constable for breach of general regulations for turnpike-roads.*

[The report may be in some such terms as the following.]

“ At \_\_\_\_\_, 182 .

“ In virtue of the preceding warrant, I, L M, constable,  
 “ this day pointed and sold by public roup the following ef-  
 “ fects belonging to C D, defender, at the following sums, viz.”  
 [insert the articles sold and the prices] “ and the expences of  
 “ pointing and sale amounted to \_\_\_\_\_ sterling.”

“ L M, Constable.”

13. *Warrant for payment for breach of the general regulations for turnpike-roads.*

“ At \_\_\_\_\_, 182 .

“ The justices find that the proceeds of the pointing and  
 “ sale amount to \_\_\_\_\_ sterling, and the expences of  
 “ pointing and sale to \_\_\_\_\_ sterling ; and grant warrant  
 “ to the constable to pay the proceeds of the sale to the amount  
 “ of the sums appointed to be levied, and of the said expences,  
 “ to the before-designated A B, complainer, to be applied in

“ terms of law, and to pay the overplus, amounting to  
 “ sterling, to the before designed C D, defender.”

“ G H, J. P.

“ J. K, J. P.

14. *Return of there not being sufficient effects, for breach of the general regulations for turnpike-roads.*

“ Upon the                      day of                      , one thousand eight  
 “ hundred and                      years, I, L M, constable of the county  
 “ of                      , by virtue of the foregoing warrant, passed,  
 “ and made diligent enquiries and search for goods and effects  
 “ belonging to C D, defender, to be poinded and sold for the  
 “ sums specified in the warrant, but could not find sufficient  
 “ goods and effects.”

“ L M, Constable.”

15. *Warrant of imprisonment for breach of the general regulations for turnpike-roads.*

“ At                      , 182

“ The justices, in respect it appears, by the preceding re-  
 “ port of L M, constable, that sufficient goods and effects be-  
 “ longing to C D, defender, to be poinded and sold in terms  
 “ of the preceding warrant, cannot be found, grant warrant to  
 “ constables to apprehend the defender and incarcerate him in  
 “ the tolbooth of                      ; the keepers whereof are hereby  
 “ ordered to receive and detain him for                      from  
 “ this date, unless the sums specified in the warrant shall be  
 “ sooner paid.”

G H, J. P.”

J K, J. P.”

[It is easy, from the forms which have been given, to frame forms for the different local acts, which, of course, cannot be admitted in a work of this description].

[It is convenient in practice to have printed forms, with the necessary blanks for names, dates, sums, &c. which make it much more easy and expeditious to carry the law into effect, and which prevent the risk of mistakes in transcribing. A set of forms under the general Scots act for highways, if not superseded by the local acts, *e. g.* Nos. 1, 2, 3, 4, 5, 6, and 7, of the preceding forms, to be printed on one sheet. A set

of forms under the general turnpike act, *e. g.* Nos. 8, 9, 10, 11, 12, 13, 14, and 15, of the preceding forms, to be printed on another sheet. And a set of forms under the local acts, in combination with the general acts, where the general acts are more or less superseded by the local acts, to be printed on another sheet. In places of great resort, it is even found necessary to frame forms to include the cases of several offenders at one time, as is done in the sheriff-court of Edinburgh. But it is better to have forms for each separate offender, where circumstances admit of it. And it does not seem necessary here to insert those more complex forms. In places where they are required, they may be adopted from those used in Edinburgh. It is recommended that the forms should be closely printed upon thin pot writing paper, which is less expensive than larger and thicker paper, and less apt to become inconveniently bulky to the constables and others, when they accumulate].

[In order to carry into effect the regulations for the police of the highways, it is necessary (as is done in the county of Edinburgh) to print a hand-bill or placard, containing a brief and distinct summary of the regulations resulting from the general acts and the local acts of the district, with the penalties, which may be put into the hands of the officers, and may be pasted up at the toll-bars and other such places of public resort].

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## HOMICIDE.

HOMICIDE is here taken in the broadest sense of the word, the killing of a human creature ; though it is sometime used to denote that species of homicide called culpable homicide.

Justices of the peace of course cannot *try* for homicide of any kind ; but they may have occasion to take the necessary steps towards getting a person accused of such a crime tried by the competent court (see *Arrest*, &c.) and to decide on his application for bail.

### GENERAL OBSERVATIONS.

It is essential to the charge of homicide that a person have been killed. No attempt to kill, even though made by poison, will fall under that charge ; though such attempts may in

many cases be cognisable crimes (*a*), and in certain cases are made capital by statute (see *Crimes in General*, sect. Wrongful Act necessary—*Injuries Real*). The person must die of the harm done by the accused, not of something to which that harm merely gave remote occasion; for example, not a consumption brought upon a person of a delicate constitution, in consequence of the confinement rendered necessary by the wound (*b*); and it will not be sufficient that the death arose from various causes concurring, of which that laid to the charge of the accused was only one; so that, in either case, it is not certain that the injury done by the accused was the cause of the death (*c*). It is homicide though the person injured be on death-bed (*d*); or though, with more skilful assistance than could be procured, he might have recovered of the injury (*e*); or though he may have survived many months, as to which there is no time fixed beyond which, if the person survive, the accused shall be free from the charge of homicide (*f*). The slaughter must be of an existing person; the procuring of abortion, though a great crime, and punishable with transportation, is not homicide (*g*). It signifies nothing who the person is, even that he is one proclaimed a rebel for a criminal cause (*h*). The manner of the death must be such wherein the act of the accused plainly appears; but it signifies not whether by his hand, as by stabbing; or by exposing to injury, as by confining in a dungeon without food, or exposing an infant to cold and hunger (*i*).

Homicide is of four kinds. 1. Murder. 2. Culpable homicide. 3. Casual homicide. 4. Justifiable homicide.

## I. MURDER.

### 1. *What it is.*

Murder is homicide done wilfully, and of malice aforethought (*j*). It is immaterial that the malice was not special to the person killed, as if a man kill one person instead of another; or that it was not directed against any one in particular, as if he fire a gun at random among a crowd, and kill a person; or that it was not prior to the meeting, if it preceded and occasioned the mortal blow (*k*). A purpose to do a grievous bodily harm, *c. g.* to give a very severe beating, death

(*a*) Hume, l. 174-8.

(*d*) Ibid. 178.

(*g*) Ibid. 181.

(*j*) Ibid. 249.

(*b*) Ibid. 176-7.

(*e*) Ibid. 178-9.

(*h*) Ibid. 182-3.

(*c*) Ibid. 177.

(*f*) Ibid. 179-181.

(*i*) Ibid. 184-6.

(*k*) Ibid. 22, 249.

following, is sufficient (*a*), though no lethal weapon be used (*b*). It is murder if a young woman be killed by a potion, administered without her knowledge, to procure abortion (*c*).

See *Duel*.

## 2. *Art and part.*

A person is art and part of murder, if actually present at the moment, though he personally do not strike, there having been an intention in him and his accomplices to do the deed; or if he co-operate at a distance by giving notice, or otherwise; or if he incite the murderer (*d*). All of a party setting out with the intention to commit a felony at all hazards, for example to rob, are art and part of a murder committed by any one of them in prosecution of their common purpose (*e*). It may be more difficult to prove this unity of design in the case of a very great mob, but the difference lies only in the greater difficulty of proof (*f*). Where the purpose of slaughter is taken up suddenly, strong proof of accession will be required (*g*). When a person is killed in a brawl, where either no wound given by any one individual was mortal, or where, if a mortal wound was given, and with the intention of killing, it cannot be said by what individual, all who have struck are punished arbitrarily (*h*). Where a slaughter is committed in a sudden quarrel by an individual, met with others for a lawful act, strong proof of accession against any one of those others, charged as art and part, will be required (*i*).

A person is guilty of the murder, as an accessory before the fact, who, knowing the mortal purpose, furnishes the immediate means of committing the deed, those means, without which it either could not have been done at all, or would have been done in a quite different manner; for example, furnishing the poison or arms, or providing money and horses, before the fact, in order to facilitate escape. It is different where the assistance is more remote; for example, lending a horse to carry the murderer to a different quarter of the country, where the man is against whom he had talked of having revenge, or the like. The assistance must be material (*j*). A person is art and part by giving orders to kill (*k*); by hiring to kill (*l*); or by advising it, if the advice be direct and special, and be the

(*a*) Hume, i. 251-4.

(*b*) Ibid. 255-7.

(*c*) Ibid. 262.

(*h*) Ibid. 267-2.

(*k*) Ibid. 272.

(*e*) Ibid. 258.

(*f*) Ibid. 263-5.

(*i*) Ibid. 269.

(*d*) Ibid. 258-262.

(*g*) Ibid. 265-7.

(*j*) Ibid. 269-272.

(*l*) Ibid. 273.

slayer's main inducement (*a*). If the person giving the order to kill have seriously countermanded it, this will free him, if the countermand reach the murderer in time, otherwise not (*b*). Though the order only extend to a grievous injury, the person giving the order is liable as a murderer, if death follow (*c*). The person giving the order to kill is liable, though there may have been a variation from his instructions in the mode of executing the order, as, by stabbing in place of shooting; or though the person employed have killed a wrong man by mistake; but not if the person employed kill a man different from that contained in his order, for a purpose of his own (*d*).

Accession after the fact, by concealing the corpse, assisting the murderer, expressing approbation of the deed, &c. unless fortified by previous instigation or assistance, will not make a man art and part of the murder (*e*).

### 3. *Punishment.*

Murder is punished with death, and confiscation of moveables, and with giving the body to be dissected, unless ordered to be hung in chains (*f*). It may be mentioned, that there is no law or authority for inflicting any indignity on the remains of the self-murderer (*g*).

## II. CULPABLE HOMICIDE.

Culpable homicide is of different kinds and degrees. It is culpable homicide, 1. Where slaughter follows in doing a law-

(*a*) Hume, 1. 273.

(*b*) Ibid. 275.

(*c*) Ibid.

(*d*) Ibid. 275-6.

(*e*) Ibid. 276-8.

(*f*) Ibid. 279.

(*g*) Ibid. 295.

*Note.*—It seems proper to mention, with regard to child murder, that it was formerly, by statute, held to be proof of this crime, that the mother did not reveal her pregnancy before the birth, or call for help in the birth, and that the child was found dead, or was amissing (1690, c. 21); but that, by a subsequent statute, those circumstances of suspicion, or of blame against the woman, are now punished only with imprisonment not exceeding two years; leaving the charge of murder to be established by ordinary proof (49 Geo. III. c. 14).

With regard to the desertion and exposure of an infant child; if this be done with circumstances shewing an intention to destroy, and death follow, this of course is murder. If the child die, by connexion with the exposure, though only accidentally, and without evidence of intention to destroy it, as by being trampled on by cattle in the field where it was left, this seems culpable homicide. Though the child do not die, its desertion and exposure to any material risk of perishing is a high crime, and punishable arbitrarily according to the circumstances. It has been punished with whipping along with imprisonment or banishment (Hume, 1. 295.) In the ordinary case, it will require a higher punishment than justices are in the use of inflicting (see *Justices*, sect. Commission, second Assignment.—*Punishment*); but justices may prepare for trial (see *Arrest*, &c.)

ful act without due caution (*a*). 2. Where it follows in doing an unlawful thing, for example, firing guns, or throwing fire works, or stones, in a street, though without purpose of bodily harm (*b*). 3. Where it follows unexpectedly, on a purpose to do a slight bodily injury; for example, from a slight scuffle between two persons, or from moderate chastisement inflicted by a teacher upon a pupil (*c*). 4. Where it is inflicted intentionally, on a purpose taken up suddenly in a scuffle, on account of some serious and real injury to the person, exciting pain and agitation, and inflicted instantly without deliberation, otherwise it is murder (*d*). A person is not freed from the guilt of murder, if he kill an officer of the law executing an irregular warrant against him, unless he be in the circumstances of bodily injury and agitation above described. If in any case the killing be deliberate, it is murder (*e*).

The punishment of culpable homicide is arbitrary, and proportioned to the guilt in the particular case.

### III. CASUAL HOMICIDE.

Where slaughter is casually committed by a person who is lawfully employed, and who neither has a purpose of bodily harm to any one, nor has been wanting in reasonable caution, he is of course not punishable (*f*).

### IV. JUSTIFIABLE HOMICIDE.

Justifiable homicide is that which the killer is bound, or entitled to commit (*g*).

#### 1. *From Public Duty.*

The following are instances of this:—1. Sentence of death lawfully pronounced by a judge (even where he has erred, unless the error be gross and scandalous) and carried into execution by a magistrate, or officer properly authorized (*h*). 2. Homicide by a magistrate, or by his order, necessarily committed in suppressing a riot, and arresting the delinquents; and this is justifiable, independently of the riot act having been read, which only makes the *continuance of the assembly* beyond a certain time suppressible by force (*i*) (see *Riot*). 3. Homicide by an officer of justice, or those assisting him, if, from the violent and powerful resistance of the criminal, or his friends, and more especially if such resistance be with mortal

(*a*) Hume, l. 228.

(*d*) Ibid. 233-244.

(*g*) Ibid. 181.

(*b*) Ibid.

(*e*) Ibid. 244-249.

(*h*) Ibid. 189-191.

(*c*) Ibid. 220-233.

(*f*) Ibid. 186-9.

(*i*) Ibid. 191-2.

weapons, that he indispensable towards taking and securing him, provided there be no plain and gross irregularity in the immediate frame and texture of the warrant (*a*). There appears to be no sufficient authority for believing that the officer has power to kill, on the delinquent merely fleeing from the execution of criminal process. 4. Homicide on resistance of a civil warrant, if the officer have evidence that his life will come to be in danger on his persisting in executing the warrant (*b*). 5. Homicide by a soldier or sailor on duty, if an outrageous disturbance be raised, so that he cannot expect to persevere in maintaining his post, without being overpowered, deprived of his arms, or perhaps of his life; or if the homicide follow in firing at a vessel neglecting to bring to, when duly ordered to do so by a vessel or boat of the navy (*c*). In urgent extremities, the soldier may act without order of his officer, though present; and, in similar extremities, the military party, brought by the civil power to quell a riot, may act without order of the magistrate (*d*). 6. Homicide by revenue officers in seizing run goods from a smuggler, if, from the resistance made, this be indispensably necessary to make good the seizure; but still due tenderness to life must be shewn (*e*). (See *Excise and Customs*, sect. Seizures; sect. Forcible Offences before Justices; sect. Forcible Offences before Higher Courts.) Force seems hardly justifiable in the entries and visitations ordered by the excise laws, as they are secured by high penalties (*f*).

## 2. From Private Duty.

The following acts of homicide are justifiable on this ground. 1. Homicide, in defence against an attempt to commit a felony (*g*). The strongest case of this class is an attempt feloniously to kill (different from danger of life in an occasional quarrel); for instance, suddenly stabbing a person from behind, or rushing out upon him from a thicket, and presenting a pistol at him. The person attacked in this way is not obliged to retire; he may provide for his security by opposing force to force, though to the death of the assailant. This right seems common to all the individuals of the party which is thus attacked. Those attacked seem to have the same powers, in pursuing and apprehending the felon, which an officer of justice would have (*h*). A woman, her husband, father,

(*a*) Hume, i. 192.

(*d*) Ibid. 208.

(*g*) Ibid.

(*b*) Ibid. 195-9.

(*e*) Ibid. 209-212.

(*h*) Ibid. 212, 213.

(*c*) Ibid. 199-208.

(*f*) Ibid. 212.



brother, or any one who is with her, may kill, in hinderance of rape, if indispensibly necessary (*a*). Resistance to death is also justifiable on an invasion of one's property, if made in such a felonious and forcible manner as necessarily occasions fear; otherwise not. For instance, it is not lawful, instead of seizing, instantly to stab a pickpocket, or to shoot a thief from behind a hedge; or to kill for searching for game without leave, or for pulling down inclosures; none of these trespasses on property being coupled with an assault on the person (for that is a more delicate question) (*b*). But, a man attacked on the highway at night, in a solitary place, to be robbed, may prevent and chastise the felony on the spot (*c*). If a man break into another man's house at night to commit theft, murder, rape, or hamesucken, or to burn the house, he may justifiably be killed. This is the case also, though he have not entered, and have not shewn precisely which of those felonies is his object, if he have broken the safeguard of the building, or be preparing to do so, and persevere in his intention to enter (*d*). But it is unlawful, perhaps murder, to shoot him without warning, while he is standing without, and the safeguard of the building is still unbroken; or intentionally to allow him to enter, and then to shoot him from a safe station within; for such measures shew rather a desire of the party attacked to shed the invader's blood, than, with due tenderness for that person's life, to defend his own. But it is different, if the invader, notwithstanding all reasonable means to scare him, openly persist in his purpose to force entry (*e*). If a man be assaulted in the open air to be robbed, or if his house be attacked to commit theft, murder, rape, or hamesucken, or to burn it during the day, he seems entitled to use as strong means of defence as if the attack had been made during the night, provided, from the situation being solitary, or other circumstances, he have no other means of defence (*f*). It would seem that, in some rare cases, a man may perhaps even kill the person depriving him of his property, though the first taking was not forcible, but secret and theftuous; for example, if he meet a thief riding off with his horse, who, being called to, refuses to stop, there being no other likely means of saving the horse (*g*). This, however, has never been decided; and it may not be prudent in any man to make the experiment. 2. Homicide, in defence of life, on a sudden quarrel. In many

(*a*) Hume, l. 213.

(*b*) Ibid. 213-14.

(*c*) Ibid. 215.

(*e*) Ibid.

(*f*) Ibid. 216.

(*d*) Ibid. 214-15.

(*g*) Ibid. 216.

such cases, some punishment is due on account of unfavourable circumstances. In order to exculpate the accused entirely, it is necessary that he have given the mortal blow while in imminent, instant, and real danger of his life; that he could not otherwise escape; that, in the choice of weapons, and all other particulars, he did his utmost to withdraw himself from the fray without shedding blood; and that he did not give occasion to the fatal strife, either by previously appointing it, as in a duel, or by giving provocation at first, whether by personal injury, or by contumelious expressions or gestures (*a*). (See *Duel*.)

It is almost unnecessary to observe, that both humanity and prudence ought to induce a man to be extremely reluctant and cautious in raising his hand against the life of another, particularly on the ground of private duty; and that all possible means ought rather to be used for securing the person of the delinquent.

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## HYPOTHEC.

HYPOTHEC is a mode of securing payment upon a moveable subject; differing from pledge in this, that the subject burdened remains in the hands of the debtor (*b*). It is noticed here chiefly on account of its affecting the diligence of pawning.

It may be either express, *i. e.* formed by the agreement of parties; or tacit, *i. e.* constituted by law, from the presumed intention of parties. Of the former, there are only two kinds admitted in our law, bonds of bottomry, where money is borrowed on the security of a ship or her freight, and loans on *respondentia*, where it is borrowed on the cargo; which it is sufficient to have mentioned. Of the latter there are various instances.

### I. LANDLORD'S HYPOTHEC FOR RENT.

The landlord's hypothec for rent, or the tenant's hypothec for sub-rent, is the most important instance of tacit hypothec.

#### 1. *Rural Subject.*

In a rural subject, *i. e.* a subject let for agriculture or hus-

(*a*) Ibid. 217-228.

(*b*) Erskine, ii. 6. 56.—iii. 2. 34.

bandry, the landlord has a hypothec for rent both on the fruits and on the live stock. In some inferior courts he is also allowed a hypothec on all other subjects brought by the tenant upon the soil, as instruments of husbandry, furniture, &c. This last, however, does not appear ever to have been distinctly acknowledged by the supreme court (*a*).

(1.) *Fruits*.—The landlord can detain the fruits upon the ground against any person, even a poinder, attempting to carry them off. And he can recover them, if they have been carried off (*b*). He may recover them *brevi manu*, of his own authority, from any other person than a poinder, if he do so *de recenti*, within a few hours (perhaps 24) after their being carried off. But if they have been settled on the ground of the purchaser or creditor, he must apply to the Judge Ordinary. If they have been pointed, he cannot recover them without the authority of the judge ordinary (*c*). He may apply to the judge ordinary at any time before warrant for delivery is granted upon the pointing. The right of recovery reaches only persons contracting immediately with the tenant; and not even them, if they purchase the *ipsum corpus* of the fruits (not by sample merely) in a public market (*d*). If the rent be current, the purchaser or creditor may keep the whole fruits, on finding caution to pay the current rent when the term shall arrive (*e*). Without caution, the purchaser or creditor cannot, before the term, carry off any part of the fruits, though they leave enough to answer the rent (*f*). After the term, they need not find caution, if they leave enough of fruits to cover the rent (*g*). But they seem bound, after the term, either to leave enough, or to *pay* the rent; *caution* does not seem sufficient (*h*).

Each years crop is hypothecated for the rent of that year of which it is the produce, whatever be the conventional terms of payment; and for the rent of that year only (*i*). It remains hypothecated till the rent be discharged. And seques-

(*a*) In *Alison* against Creditors of Campbell, July 1748, Kilk. Hyp. 6. the Court thought that the landlord of a rural tenement might retain the tenant's furniture; but did not distinguish whether by a hypothec, or by an ordinary right of retention. And see the doubts entertained on the Bench in *M'Kenzie* against Crichton, 19th June 1747; *Elchies*, Hyp. No. 13.

(*b*) *Erskine*, ii. 6. 58.

(*c*) *Ibid.* 60.—Kilk. Hypothec, 4.

(*d*) *Erskine*, ii. 6. 60.

(*e*) *Ibid.* 59.

(*f*) *Ibid.*

(*g*) Kilk. Hypothec, 1.

(*h*) *Ibid.*

(*i*) *Erskine's* smaller work, ii. 6. 26.—*Crawford* against *Stewart*, 21st January 1737, in *C. Home*, No. 49, and in Kilk. Hypothec, 1, and reported 18th February 1737 in *Elchies*.—*Taylor* against *Davidson*, 19th January 1750, in Kilk. Hypothec, 8, and reported 11th January in *Elchies*.

tration is not necessary to make the right special upon the fruits.

The procedure for sequestration and for sale, both of the fruits and of the live-stock, takes place before the Judge Ordinary. But it may be proper to describe the procedure generally. The landlord gives in a petition to the sheriff or other judge-ordinary praying for sequestration and sale. An order is pronounced sequestrating the effects, appointing them to be inventoried, usually by the clerk of court or his assistants, and appointing a copy of the petition, and of the interlocutor sequestrating, to be served on the tenant, and him to lodge answers within a certain short time. The effects are accordingly inventoried, and a copy of the inventory is delivered to the tenant; the petition and interlocutor are served on the tenant; and when the rent becomes due, if answers have not been lodged, or if a sufficient defence be not stated, warrant is granted to some indifferent person, usually to the clerk of court, to sell the sequestrated effects by public roup for the rent in question, and for the expences of sale, and also for the expences of process if they be found due. They are sold accordingly. A state of the proceeds and of the rent and expences is made out, and laid before the judge, who grants warrant for paying the rent, and the expences found due, to the landlord, and for paying the balance, if any, to the tenant; which is done accordingly.

(2.) *Live Stock*.—The cattle and live stock brought upon the ground are also hypothecated to the landlord for the rent.

The right, however, is not real to all effects upon every individual, as in the hypothec on the fruits. Sequestration is necessary to make it so against a purchaser (though not against a creditor *(a)*), as far as regards recovery, unless there be collusion. The right of retention is the same as in the fruits *(b)*. Recovery is competent against a poinder, though sequestration have not been used *(c)*; but not *via facti*, of the landlord's own authority *(d)*; he must apply to the judge ordinary to whom the pouding is reported.

The stock is hypothecated for each year's rent successively. It ceases to be hypothecated for any one year, three months after the last conventional term of payment of that year's rent *(e)*.

(a) Macdowal against Jamieson, 15th February 1781.

(b) Erskine, ii. 6. 61.—Pringle against Scott, 22d July 1736, Elchies.

(c) Macdowall against Jamieson, *supra*.

(d) Currie against Crawford, 25th June 1746, Kilk. Hyp. 4.

(e) Erskine, ii. 6. 62.—Bell, 3d edit. ii. 104.

Though only one year's rent can be secured on one subject at one time, there may, in certain situations, be a subsisting hypothec for the rent of two years between the crop and the stock. Thus, if the rent for one year be payable by agreement at Candlemas and Lammas of the following year, and if the crop of the second year be produced in October of that year, that crop is hypothecated for its own rent payable in the third year; and the stock is at that time hypothecated for the first year's rent, as three months have not elapsed from the last conventional term of payment of that year's rent.

The landlord's right of hypothec, over both the crop and cattle of the sub-tenant, for rent due by the tenant, is equally strong and extensive as over those of the tenant, unless he have acknowledged or accepted the sub-tenant, as by taking rent from him. But even in that case, the landlord is preferable to other creditors of the tenant, for the rent unpaid (*a*).

With regard to cattle belonging to strangers, *e. g.* horses taken in to graze, the landlord has no hypothec on them for the tenant's rent (*b*); but he may detain them for the grass-mail due by the owners, for which he is preferable.

## 2. *Urban Subject.*

In an urban subject, that is, a subject let for inhabiting, carrying on trade, or the like, though it do not happen to be situate in a town, the landlord has a hypothec on the goods brought into it by the tenant, for a year's rent. This holds in tacks not only of dwelling-houses, but of all tenements which have no natural fruits; as mills, shops, &c. In dwelling-houses this right includes household stuff, books, plate, paintings, and whatever else, the property of the tenant, or for his permanent use, is brought into them (*c*). It extends to furniture hired by the tenant (*d*). It was in one case found not to extend to furniture gratuitously lent to the tenant (*e*). In a later case, it was found to extend to furniture which had belonged to a bankrupt tenant, which the creditors allowed to remain in the house without rent (*f*). This case is represented in the report as establishing the general doctrine that the hypothec extends to furniture lent without hire. By some, indeed, it is considered not to have altered the rule which de-

(*a*) Erskine, ii. 6. 63.

(*b*) Erskine, *ibid.*—Brown against Sinclair, 19th November 1724.—Roes Mackie against Nabony, 4th December 1780.

(*c*) Erskine, ii. 6. 64.

(*d*) Bell's Commentaries, 3d edit. ii. 102, and cases there cited.—Penson and Robertson against Hepburn, 6th June 1820.

(*e*) Bell's Com. *ibid.*

(*f*) Wilson against Spankie, 17th Dec. 1813.

terminated the previous case, but to be rather an exception, on the ground that credit for rent was continued on the possession of the furniture (*a*). But this seems questionable. In mills, &c. this right includes the utensils brought into them by the tenant (*b*).

The landlord has nearly the same powers over this subject of hypothec as over the cattle and stocking of a rural subject. He may retain it if not carried off. If a poinder carry it off, that person must either replace it or pay the value (*c*). If a few articles have been sold and delivered without any collusion or ground of suspicion, the purchaser is safe, if there have been no sequestration obtained (*d*). The tenant of a shop or warehouse has, of course, a greater latitude for selling than the tenant of an ordinary dwelling-house. The landlord does not lose his hypothec by the mere expiry of the term, or by the removal of the goods on the term day. It subsists for three months longer, by sequestration within which time he may attach them, so as to be preferable to the claim for the current term's rent (*e*).

The sequestration and sale are obtained from the Judge Ordinary, in the manner before mentioned.

The claim of the crown for taxes, &c. is preferable to the landlord's hypothec, unless the landlord have got the subject sold, and have got an order on the clerk to pay the price to him, before the poinding or other process for attachment by the crown has been commenced (*f*). And farther, the legislature has made special provision in the case of the assessed taxes, and which is referred to in the subsequent acts of Parliament relative to the assessed taxes, that no moveable effects are to be taken by arrestment, poinding, sequestration, or other diligence, or by any assignation, unless the creditor before the sale or removal pay the arrears of assessed taxes due at the time, or payable for the year in which such diligence is used, provided the duties be not claimed for more than a year; and on payment of the duties for a year, the creditor may proceed, otherwise the effects are to be distrained for the whole of the

(*a*) Bell's Com. 3d edit. ii. 102.

(*b*) Erskine, ii. 6. 64.

(*c*) Jackson against Lind, 9th July 1745, Falconer.

(*d*) Erskine, ii. 6. 64.

(*e*) Christie against M'Pherson, 14th December 1814.

(*f*) Ogilvie against Wingate, 29th June 1791, as reversed in the House of Lords, 13th June 1792.—Leslie against Tweedie, 3d December 1793.—Robertson against Jardine, 6th July 1802. In those three cases, the claim of the Crown arose upon a decree of justices of peace, under the excise laws.—The King against Johnstone, 29th June 1809, in Exchequer; Bell, 3d edit. ii. 64.

duties (*a*). Under this provision, the crown has a preference for the taxes of one year, even though the process for attachment has not been commenced. This preference is usually applied to the current year, a preference for the years in arrear having usually been previously secured by commencement of the crown process.

The claim of a farm servant employed by a tenant, for the wages of the current year, is preferable over the crop of that year to the landlord's claim upon that crop under his hypothec for the year's rent due by the tenant (*b*).

## II. OTHER TACIT HYPOTHECS.

There are several other tacit hypothecs; but as they can hardly occur before justices of peace, it will be sufficient just to mention them. The owners of a ship have a hypothec (or rather a right of retention) on the cargo for the freight. Persons repairing a ship, in a port which is foreign with regard to her (*c*), have a hypothec on her for the expence. Persons repairing a house within borough, by warrant of the Dean of Guild, have a hypothec on the house for the expence (*d*).

See *Retention—Pounding—Pledge*.

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## IDIOTS AND FURIOUS PERSONS.

CURATORS are appointed in due course of law (not by justices) to idiots and madmen. The powers of such curators, and the obligations under which their offices lay them, are the same as those of tutors to pupils (*e*). (See *Minors*). Their office expires either by the death of the person under curatory, or by his radical return to a sound mind (*f*). Such curators are more properly called tutors, from the extent of their powers.

Sometimes a *curator bonis* is appointed by the Court of Session to manage the affairs of those who, though neither idiots nor madmen, are, from some other cause, as extreme old age, unfit to manage their affairs.

(*a*) 43 Geo. III. c. 150, sect. 33.

(*b*) M'Glashan against Duke of Athole, 29th June 1819.

(*c*) Hamilton against Wood, 29th July 1788.

(*d*) Erskine, iii. l. 34.

(*e*) Ibid. i. 7. 52.

(*f*) Ibid.

It is the duty of a justice of the peace to get furious persons going at large secured till they be properly disposed of. If they be not immediately taken care of by their friends, or by their parish, it is usual to give intimation to the procurator-fiscal of the judge-ordinary of the bounds, in order that that judge may dispose of them. And if no other arrangement can be made by getting their friends to take care of them, or by getting them sent to some suitable place of confinement at the expence of their parish, the usual course is understood to be to commit them to jail till they find surety to keep the peace; in which course they continue in jail, unless otherwise properly disposed of. But, as such persons are improper inmates of a jail, it seems proper to endeavour to get them disposed of otherwise (*a*). In the county of Edinburgh, the usual course is for the sheriff, on the application of the procurator-fiscal, and the production of a medical certificate of insanity, to grant warrant to commit such persons to the bedlam attached to the charity work-house of the city, the procurator-fiscal granting an obligation for the aliment, for which he has relief against the parish where such persons were apprehended (*b*); and it is believed that a similar course is followed in other counties where there are similar means. (See *Crime in general*, sect. Insanity.—*Poor*, sect. Legal parish.)

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## IMPRISONMENT.

IMPRISONMENT is to be noticed here only as a mode of executing sentences in civil cases.

Justices of the peace cannot, in general, use imprisonment to enforce their decrees in civil cases (*c*). It has been found that no inferior court (except magistrates of boroughs, who, in certain cases, grant acts of warding) can enforce civil decrees, even for performance of a fact, by imprisonment (*d*). The Court of Session is, by various statutes, directed to grant letters of horning and caption (imprisonment) on the civil decrees of certain inferior judges; which is done as a matter of

(*a*) It may be mentioned that, by act 55 Geo. III. c. 69, madhouses are placed under the control of the sheriffs, and various regulations are there made with regard to them.

(*b*) See Scott against the Reverend John Thomson, 13th Nov. 1818.

(*c*) Erskine, iv. 3. 16.—Blaw against Geddes, 9th July 1754.

(*d*) Murray against Bisset, 15th May 1810.



course. But justices of the peace are not included in those statutes; and, therefore, it has been found that horning and caption are not competent on their decrees (*a*).

It has been found, however (although with some difference of opinion among the judges) that, as a matter of police and by ancient usage, sheriffs (and the same must apply to magistrates of burghs, as judges ordinary within their bounds) may grant summary warrants of imprisonment against workmen who desert their service, till they find caution to complete the period of their contract of service (*b*). But it has been found that, in a contract of service for a limited period, it is not competent for a judge ordinary, after the period is expired, to grant a summary warrant of imprisonment to compel the workman to make up the days on which he had been absent during the stipulated period, no wages having been paid for the time the workman was absent (*c*). And it has been found that a judge ordinary has no power to grant warrant for summary imprisonment of an apprentice who had deserted his service, "until he shall find caution to implement and fulfil his part of the indenture," upon the ground that he could only be required to find caution to return to his service, and remain in it during the stipulated period, but could not be required to find caution for implementing the obligations incumbent on him generally (*d*). The course followed in practice is to present a petition stating the facts, on which the workman is apprehended for examination. If in his declaration he admit the facts, and if he offer no defence, warrant is immediately granted to imprison him till he find caution, under a suitable penalty, to return to his service and continue in it during the stipulated period. If he do not admit the facts, or if he offer any defence, he is appointed to answer the petition, and the case proceeds by proof, or otherwise, in the usual summary form; and the workman is in the meantime put under suitable caution to appear at all diets of court when required. (See *Soldiers*, sect. Civil Power and Courts).

Where judgment is given both for a fine to the public, and for damages to the private party (as to the competency of which before justices, See *Justices*, sect. Particulars not in commission) the supreme criminal court are in the use of ordering the delinquent to be imprisoned till he pay the damages as

(*a*) Stevenson against Barclay, 9th March 1756.—Fairley and others, 6th July 1805.

(*b*) Reid against Raeburn, 4th June 1824.

(*c*) Campbell against Anderson, 6th December 1825.

(*d*) M'Gregor against Wright, 9th February 1826.

well as the fine (*a*). The same course is said to be followed by the justices in many counties, though not in all (*b*). But it is understood that the greater part of sheriffs decline to imprison for the damages in such a case, on account of the difference between the supreme and inferior courts, and leave the pursuer to recover them by the ordinary legal compulsitors, which seems to be the more adviseable course. For expences along with a fine, see *Process*, sect. Procedure on Complaint.

Justices may imprison under the small debt act, as noticed under that head.

A civil claim, though founded on a criminal act, even fraud or theft, is not a ground for commitment of a party till he find caution to answer to the action, except where he is *in meditatione fugæ* (*c*). See *Process*, sect. Civil Cases.

A person cannot be apprehended and imprisoned for a civil cause on Sunday, or any day appointed by the state for humiliation or thanksgiving. He may on the *night* of a lawful day (*d*). A person cannot be apprehended in the sanctuary of Holyrood-house at Edinburgh for imprisonment for debt, provided he has been booked within 24 hours after entering the sanctuary (*e*); and even though he has not been booked, the concurrence of the bailie is necessary (*f*). But he may be imprisoned in the Abbey jail on a decree of the bailie of the Abbey for debts contracted within the sanctuary (*g*).

Neither married women (see *Marriage*) nor pupils, (see *Minors*) nor peers, nor members of parliament, during the sitting of parliament, or for forty days after every prorogation, or forty days before the next appointed meeting, can be imprisoned for a civil cause (*h*); nor soldiers (which see) for a debt under L.20; nor seaman of the navy (which see) for a debt under that amount.

A prisoner for debt may get out of jail by a sick bill, or under the Act of Grace, by authority of the magistrates, keepers of the jail; or by a *cessio bonorum* before the Court of Session. But none of these fall under the cognizance of justices of the peace.

For imprisoning a fugitive debtor, see *Meditatio Fugæ Warrant*.—*Border Warrant*.

(*a*) Hume, ii. 474.

(*b*) Hutcheson's *J.* P. 3d edit. i. 291.

(*c*) Smith against Likely and Craufurd, 12th February 1812.

(*d*) Bell's *Com.* 3d edit. ii. 479.—Thomson's *Messenger*, p. 228.

(*e*) Grant against Donaldson, 15th January 1799.

(*f*) *Ibid.*

(*g*) Cockburn, 12th June 1708, Dict. ii. 361; Fount. ii. 442.—Townly against Ogilvie, 24th February 1810.

(*h*) Erskine, iv. 3. 25.—Bell's *Com.* 3d edit. ii. 479.

For imprisonment in criminal cases, see *Arrest, &c.—Commitment for trial.—Punishment.*

For execution in civil cases, See *Poinding.—Arrestment.*  
See *Wrongous Imprisonment.*

## INCEST.

INCEST is the crime of carnal intercourse between persons within certain degrees of relationship. These degrees are those contained in *Leviticus*, c. xviii. Parent and child: grandfather and grand-daughter: brother and sister, whether uterine or consanguinean: nephew and aunt, whether by father or mother: uncle and niece: father and daughter-in-law: son and step-mother: father and step-daughter: husband and wife's daughter, or grand-daughter, either by her son or daughter. brother and brother's wife; there are doubts of brother and brother's *widow*: husband and living wife's sister; there are doubts of husband and *dead* wife's sister; woman and husband's nephew by his brother: man and grand-aunt by affinity. Illicit commerce with two brothers or sisters seems not *incest*; but it seems cognizable by a criminal court. With regard to bastard relations, intercourse between a mother and a son is incest; there seems difficulty in carrying it farther. It is essential to guilt that the accused knew of the relationship. The crime is capital (*a*). The attempt to commit it is punishable arbitrarily (*b*).

Justices of course cannot try for this crime, but they seem competent to precognosce for it (see *Arrest, &c.*)

## INJURIES, REAL.

UNDER the term Real Injuries, are comprehended those offences against the person which are not comprehended under separate heads.

Some real injuries are subject to a precise and severe punish-

(*a*) Hume, i. 441-8.

(*b*) Ibid. 448.

ment by special statutes. Certain injuries to the person, by shooting at, stabbing, cutting, attempting to poison, throwing corrosive substances, &c. are made capital by statute (see *Crime in general*, sect. Wrongful act necessary). A child above 16 years of age beating or cursing his father or mother, by blood, is punishable capitally; under 16, but past pupillarity, arbitrarily (*a*). The assaulting of clergymen was (by acts passed during great animosity between the Presbyterians and Episcopalists) made severely punishable; if with intent to kill, capitally; otherwise, with escheat of moveables (*b*). Assaulting any person in the King's presence, or in his chamber, &c. or in his palace, is an aggravated offence, but not capital (*c*). Invading any of the King's officers, or any member of the session, or secret council, on account of service done to the King, is capital (*d*).

At common law, all assaults or real injuries to the person are punishable arbitrarily. Assault with intent to kill is punishable with the highest arbitrary pains, if the person have been wounded; otherwise, more leniently. Assault with intent to ravish, to rob, or to extort a deed, is also highly punishable. Mutilation or maiming has the highest arbitrary punishment. The Court of Justiciary usually remit the lowest degree of assault to an inferior judge (*e*).

Provocation by words may alleviate, but will not exculpate. Provocation by real injuries to the person may often exculpate; but the party invaded must keep within the bounds of allowable resentment; and no considerable interval must have elapsed (*f*).

Prosecution by the person injured is excluded by his remission; and both by him and the public prosecutor by the lapse of a sufficiently long period of time; which, however, is not precisely fixed (*g*).

The lowest class of real injuries or assaults may be tried before justices of the peace. The higher classes cannot; but justices may arrest and precognosce for them. (See *Arrest, &c.*)

For assaulting judges, see *Courts*.

See *Crime in general*.—*Breach of the Peace*.

(*a*) 1661, c. 20.—Hume, i. 318–320.

c. 7.—1670, c. 4.

(*d*) 1600, c. 4.—Hume, *ibid*.

(*f*) *Ibid*. 326–330.

(*b*) 1587, c. 27.—1633,

(*c*) Hume, i. 321.

(*e*) Hume, i. 322–6.

(*g*) *Ibid*. 330–1.

## INTEREST.

INTEREST (questions with regard to which may occur before justices in the exercise of their civil jurisdiction) is the profit due by the debtor of a sum of money to the creditor, for the use had of it (*a*).

It is frequently due by agreement express or tacit. It is in many cases due by law, independently of special agreement. It is due on bills of exchange, inland or foreign (*b*), and on promissory notes (*c*). It is due on a sum belonging to another, received by any person, which formerly carried interest (*d*). It is due on a sum paid for another person by his desire (*e*). It is frequently allowed not only to merchants, but to others, as a recompence for the want of their money, though no backwardness appear in the debtor (*f*). It becomes due on any sum, even bygone interest, by horning being used for it, and the debtor being properly denounced rebel upon that horning at the head burgh of the jurisdiction of his residence (*g*). It is due on cess (*h*). In short, by common understanding, and ordinary practice, it is now a general rule, with a few exceptions, that interest is due on money advanced, on money withheld, and, in general, on money in any way due to another, unless there be ground in the circumstances of the case to hold that interest was not intended to be demanded (*i*). It is not, however, usually due on a loan of money, unless specially stipulated, or unless such condition be implied from the employment or course of dealing of the parties, or unless repayment have been demanded and delayed.

Interest begins to run from the day fixed for that purpose, where there is such; if there is not, from the stipulated day of payment; where the time of payment is optional, as in bills, payable at sight, from demand; to mandataries, from the advance; on the price of property purchased, from the accruing of benefit from the purchase; on an open account to a merchant, shopkeeper, &c. from the date of credit usual in the trade or in the course of dealing between the parties (*j*); on cess, when six months due (*k*); on bills, from their date in

(*a*) Erskine, iii. 3. 75.

(*b*) 1681, c. 20.—1696, c. 36.

(*c*) 12 Geo. III. c. 72,

sect. 36, made perpetual by 23 Geo. III. c. 18, sect. 55.

(*d*) Erskine, ii. 3. 79.

(*e*) Ibid. 80.

(*f*) Ibid. 80.

(*g*) Ibid. 77.—ii. 5. 56.

(*h*) 1686, c. 2.

(*i*) See Bell's Com. 4th edit. i. 559.—Crawford and Stark against Bertram and others, 15th May 1812.

(*j*) Bell, ii. 391-2.

(*k*) 1686, c. 2.

case of non-acceptance ; and from their falling due, in case of acceptance and non-payment (*a*) ; on promissory-notes as on bills (*b*).

It is not usually admissible upon interest. It cannot exceed five per cent. upon debts due in this country. See *Usury*.—*Pledge*, sect. By statute.

## JUSTICES OF THE PEACE.

### I. HISTORY AND APPOINTMENT.

JUSTICES of the Peace are persons appointed by royal commission to keep the peace within certain limits, and for the execution of matters entrusted to them by the commission and by particular statutes.

They were introduced into Scotland towards the end of the sixteenth century (*c*), in consequence of its turbulent state. They have had their office greatly improved by various enactments since that time. A number of general regulations for them were made by Parliament in 1617, which were re-enacted in nearly the same terms, with some additions, in 1661 ; and these two acts (*d*) are still considered as the general code with regard to the duties of the office in Scotland. Under these acts, however, the powers of the justices were cramped by some unnecessary or hurtful restrictions. But, upon the union with England, all those restrictions were removed ; and Justices of the peace in this country were vested with the same powers for the preservation of the peace as those in England (*e*).

Certain dignified persons, among others the Privy Counsellors, the Judges of the three Supreme Courts of Session, Justiciary, and Exchequer, the Lord Advocate, and the Solicitor-General of Scotland for the time, are appointed justices of the peace in the commission for each county. The other persons named in the commission are persons more immediately connected with the county.

No particular qualification in rank or property is necessary in this country to entitle persons to act as justices of the peace (*f*), though certain restrictions in these respects are,

(*a*) 1681, c. 20.—1696, c. 36.

(*b*) 12 Geo. III. c. 72, sect. 36, made perpetual by 23 Geo. III. c. 18, sect. 55.

(*d*) 1617, c. 8.—1661, c. 38.

Commission.

(*c*) 1557, c. 82.—1609, c. 7.

(*e*) 6 Anne, c. 6, and

(*f*) Hutcheson's J. P. 3d edit. l. 42.

th propriety, observed in different counties. There is, however, a disqualification introduced by an act of Parliament, that no solicitor or procurator in any inferior court in Scotland, the partner of any such person, shall continue, or be a justice of the peace, or act as such in any county in Scotland, while he or his partner shall continue in the business or practice of solicitor or procurator in any inferior court (*a*).

Before entering upon their office, Justices must swear (in the terms mentioned afterwards) that they shall perform their duty faithfully and impartially. They must also take the oaths required to be taken by all persons in public trust (*b*). (See *Oaths*).

## II. NATURE OF THE OFFICE.

The powers and duties of justices can be fully known only by considering in detail the various articles falling under their cognizance. But it seems proper to make general mention of them here. The most important particulars are contained in the royal commission and the oath of office. These shall therefore be here given, with a few remarks on the particulars contained in them. A few particulars not contained in these shall then be mentioned.

### 1. *Commission and Oath, with Remarks.*

(1.) *Commission of the Peace*.—"George IV. by the grace of God of the united kingdom of Great Britain and Ireland, King, Defender of the Faith, To [Here the justices are named]. Greeting.

[First assignment].—Know ye, that we have assigned you, jointly and severally, and every one of you, our justices, to keep our peace in our county of M; and to keep, and cause to be kept, all the ordinances and statutes for the good of our peace, and for the preservation of the same, and for the quiet rule and government of our people, made in all and singular their articles in our said county (as well within liberties as without), according to the force, form, and effect of the same; and to chastise and punish all persons that offend against the form of those ordinances or statutes, or any one of them, in the aforesaid county, as it ought to be done, according to the form of those ordinances and statutes;

(*a*) 6 Geo. IV. c. 48, sect. 27. This is a section of the *small debt act*. But it is a *general* disqualification, and is not confined to proceedings under the small debt act. It was adopted (*mutatis mutandis*) from a clause in an English statute introducing a general disqualification of a similar kind in that country.

(*b*) Erskine, i. 2. 3.

“ and to cause to come before you, or any one of you, all those  
 “ who, to any one or more of our people, concerning their  
 “ bodies or the firing of their houses, have used threats, to find  
 “ sufficient security for the peace, or their good behaviour to-  
 “ wards us and our people ; and if they shall refuse to find  
 “ such security, then them in our prisons, until they shall find  
 “ such security, to cause to be safely kept.”

This first assignment authorizes any one justice to take the proper steps for preventing breaches of the peace, and for getting any person guilty of a breach of the peace brought to trial. One justice out of court may, by a warrant directed to a constable or other proper person, order suspected houses to be searched, or suspected persons to be apprehended, and brought before him to be examined, or bound to the peace. He can also precognosce witnesses in a criminal case, and commit the accused to jail for farther examination, or for trial. (See *Arrest, &c.—Commitment for Trial.—Search Warrant.—Surety of the Peace.—Surety for the Good Behaviour* ).

In certain cases, noticed in their places, the powers of a single justice are more extensive.

Justices are authorized to act “ as well within liberties as without.” And in Scotland county justices are in the use of acting in and for any city comprehended within their county. Thus the justices of Mid-Lothian act even in and for the city of Edinburgh, and hold their quarter-sessions there ; for though it has a separate establishment of sheriffs and justices of the peace, it does not strictly form a county of itself ; it has not a privative jurisdiction.

[Second assignment.]—“ We have also assigned you, and  
 “ every two or more of you, of whom any of you the aforesaid,  
 “ [here the justices before named are again mentioned], we  
 “ will shall be one, our justices, to inquire the truth more fully,  
 “ according to the law and custom of the land, of all, and all  
 “ manner of felonies or capital crimes, poisonings, enchant-  
 “ ments, sorceries, arts magic, trespasses, forestallings, regrat-  
 “ ings, ingrossings, and extortions whatsoever ; and of all and  
 “ singular other crimes and offences, of which the justices of  
 “ our peace may or ought lawfully to inquire, by whomsoever,  
 “ and after what manner soever, in the said county done or  
 “ perpetrated, or which shall happen to be there done or at-  
 “ tempted ; and also of all those who, in the aforesaid county,  
 “ in companies, against our peace, in disturbance of our peo-  
 “ ple, with armed force, have gone or rode, or hereafter shall  
 “ presume to go or ride ; and also of all those who have there



"lain in wait, or hereafter shall presume to lie in wait, to  
 "maim, or cut, or kill our people; and also of all victuallers,  
 "and all and singular other persons who, in the abuse of  
 "weights or measures, or in selling victuals against the form  
 "of the ordinances and statutes, or any one of them therefor  
 "made, for the common benefit of our people, have offended,  
 "or attempted, or hereafter shall presume to offend or attempt;  
 "and also of all sheriffs, bailiffs, stewarts, constables, keepers  
 "of gaols, and other officers, who, in the execution of their of-  
 "fices, about the premises, or any of them, have unduly be-  
 "haved themselves, or hereafter shall presume to behave them-  
 "selves unduly, or have been, or shall happen hereafter to be  
 "careless, remiss, or negligent in our aforesaid county; and  
 "of all and singular articles and circumstances, and all other  
 "things whatsoever that concern the premises, or any of them,  
 "by whomsoever, and after what manner soever, in our afore-  
 "said county done or perpetrated, or which hereafter shall  
 "there happen to be done or attempted, in what manner so-  
 "ever; and to inspect all indictments or libels whatsoever, so  
 "before you, or any of you, taken, or to be taken, or before  
 "others late our justices of the peace in the aforesaid county  
 "made or taken, and not yet determined; and to make and  
 "continue processes thereupon against all and singular the  
 "persons so indicted or accused, or who before you hereafter  
 "shall happen to be indicted or accused, until they can be  
 "taken, surrender themselves, or be outlawed, or declared re-  
 "bels; and to hear and determine all and singular the felo-  
 "nies, capital crimes, poisonings, enchantments, sorceries, arts  
 "magic, trespasses, forestallings, regratings, ingrossings, ex-  
 "tortions, unlawful assemblies, indictments aforesaid, and all  
 "and singular other the premises, according to the laws and  
 "statutes of the kingdom, as in the like cases it has been ac-  
 "customed or ought to be done; and the same offenders, and  
 "every of them, for their offences, by fines, ransoms, amercia-  
 "ments, forfeitures, and other means, as according to the law  
 "and custom of the land, or form of the ordinances or statutes  
 "aforesaid, it has been accustomed or ought to be done, to  
 "chastise and punish; provided always, that if a case of dif-  
 "ficulty, upon the determination of any of the premises before  
 "you, or any two or more of you, shall happen to arise, then  
 "let judgment in no ways be given thereon before you, or any  
 "two or more of you, unless in the presence of one of our jus-  
 "tices, or of one of our justices appointed to hold courts of  
 "circuit in the aforesaid county."

This second assignment comprehends those matters of which

two or more Justices may take cognizance for trial. It appears to give to the Justices power to judge of the highest crimes. And, in England, they do judge in important cases with juries; which is necessary, as the sheriffs there have not now (though they at one time had (*a*)) the extensive judicial powers held by the Scots sheriffs. But, in Scotland, the power of Justices of the peace is, from the circumstance of their never using juries, limited, in judging, to petty delinquencies. They seem, however, competent to judge in all petty crimes tending to the disturbance of public tranquillity (except defamation not accompanied by a threatening of a breach of the peace (*b*)), where the libel concludes only for fine or imprisonment, or perhaps banishment from the county (see *Punishment*); particularly breaches of the peace and petty acts of theft or pickery. The precise limit of their criminal jurisdiction is very liable to controversy (*c*); but it is better that they should keep within their commission than that they should exceed it; particularly as the other criminal establishments in this country are so perfect and so efficacious. In a recent case, where justices had inflicted a high fine for wilful imposition, fraud, and cheating, and had declared the accused infamous, the Court of Justiciary did not seem to doubt that, from usage, justices could competently judge in charges of such magnitude; but they expressed very strong opinions, that cases which are truly infamous should be tried (whatever the conclusions of the libel may be) only by a court which proceeds with a jury; so that the *infamia juris*, if due, may be imposed; and they were of opinion that, when a procurator-fiscal has doubt as to a charge being of that nature which it is proper for his court to try, he ought to transmit the precognition to the agent for the Crown at Edinburgh, for instructions (*d*). In a still more recent case, in which the owner of a horse, which was killed by his servant cruelly thrusting a stick down its throat, had brought a prosecution for punishment and damages before the justices of Roxburgh, with concurrence of their procurator-fiscal (the counsel for the Crown having declined to prosecute before the Court of Justiciary, and the procurator-fiscal of the Sheriff-court having declined to insist in a prosecution before the Sheriff), and in which a bill of advocacy was presented, chiefly on the incompetency of the justices,

(*a*) Bacon's Abridgement, Sheriff.

(*b*) Sharp against Maxwell, 11th July 1711; Dict. ii. 508; Forbes—Bell against Dundas, 4th February 1752.

(*c*) Hume, 2d edit. ii. 67.

(*d*) Advocacy, Watson and Ramsay against Meek, 27th January 1813, in Justiciary Court.

the Court of Justiciary “find that, although offences of the nature specified in the original complaint may competently be tried by the justices of the peace, yet that it is not expedient to proceed before that court in the present case; and therefore remit to the justices of peace, with this instruction, that they dismiss the complaint; but without prejudice to the prosecutor to prosecute the defender *de novo* before the Sheriff, or otherwise as it should seem had been recommended to him by the Crown agents.” (a). Justices can take cognizance of the more atrocious crimes, only to the effect of preparing them for a higher tribunal, by securing the delinquent, and collecting the necessary evidence. See *Arrest*, &c.

Justices cannot act judicially, to judge and determine any case, unless two be present. (See *Sessions*). It is unnecessary to notice the distinction of certain of their number being of the *quorum*, as that was never observed in this country.

They are directed, in cases of difficulty, to decide only in presence of “one of our justices, or of one of our justices appointed to hold courts of circuit in the aforesaid county;” which, when applied to the law of Scotland, must be understood of a Lord of Justiciary; but there have been few instances of Scottish justices exercising such extensive jurisdiction (b).

(Charge to the justices.)—“And therefore we command you, and every of you, that to keeping the peace, ordinances, statutes, and all and singular other the premises, you diligently apply yourselves; and that at certain days and places, which you, or any such two or more of you, (as is aforesaid) shall appoint for these purposes, into the premises you make inquiries, and all and singular the premises hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of the land; saving to us the amerciements and other things to us therefrom belonging.”

(Charge to the Sheriff)—“And we command, by the tenor of these presents, our sheriff of M. that, at certain days and places, which you, or any such two, or more of you, (as is aforesaid) shall make known to him, he cause to come before you, or such two or more of you, (as aforesaid) so many and such good and lawful men of his bailiwick (as well within liberties as without), by whom the truth of the matter in the premises shall be the better known and determined.”

This does not apply in Scotland, juries not being used by justices of the peace here.

(a) Advocation, Fisher against Robertson and Smith, 14th January 1815.

(b) Erskine, i. 4. 18.

(Rolls of the peace.)—" We also command the keepers of the rolls of our peace, in our county aforesaid, to bring before you, at the days and places aforesaid, the writs, precepts, processes, and indictments aforesaid, that they may be inspected, and by a due course determined, as is aforesaid.

" In witness whereof, we have caused these our letters to be made patent. Witness ourself, at Westminster," &c.

(2.) *Oath of office.*—" Ye shall swear that, as justice of the peace in the county of M. in all articles in the King's commission to you directed, you shall do equal right to the poor and to the rich, after your cunning, wit, and power, and after the laws and customs of this realm, and statutes thereof, made : And ye shall not be of counsel with any person in any quarrel hanging before you : And that ye hold your sessions after the form of the statutes thereof made : And the issues, fines, and amerciements, which shall happen to be made, and all forfeitures which shall fall before you, ye shall truly cause to be entered, without any concealment or embezzling, and truly send them to the King's Exchequer : Ye shall not let for gift, or other cause, but well and truly ye shall do your office of justice of the peace in that behalf : And that you take nothing for your office of justice of the peace to be done, but of the King, and fees accustomed, and costs limited by statute : And ye shall not direct, nor cause to be directed, any warrant by you to be made, to the parties, but ye shall direct them to the bailiffs of the said county, or other the King's officers or ministers, or other indifferent persons, to do execution thereof. So help you God."

This oath (which is annexed to the commission) is now always taken by justices of the peace in Scotland, instead of the oath contained in the general Scots acts.

## 2. *Particulars not in Commission or Oath.*

The general jurisdiction of justices, independently of particular enactments, relates only to the preservation of the peace. Thus, they cannot ordain a minister and kirk session to proclaim banns of marriage (*a*) ; and they cannot judge in a complaint for shooting pigeons, founded on the acts 1567, c. 16, and 1597, c. 270 (*b*) ; these acts having passed before their appointment, and not having been specially committed to them afterwards. (See *Pigeons*.)

They have the execution of various penal statutes commit-

(*a*) Hairgrieve and Donaldson against Minister and Kirk-session of Linton and Eckford, 13th July 1749, in *Kilk. Jurisdiction of Justices*, No. 6.

(*b*) Murray against Turnbull, 19th January 1797.

ted to them, particularly regarding rural economy, *e. g.* *Planting and Enclosing, &c.*

They judge in a numerous and important class of questions with regard to the revenue, not only excise and customs, which are permanently placed under their jurisdiction, to a certain extent, but other branches of the revenue, of a more temporary and changeable nature, which are frequently placed under their jurisdiction, to a certain extent, by the acts from time to time passed with regard to those branches.

They have various important ministerial duties committed to them; *e. g.* *Highways, &c. (a).*

With regard to their civil jurisdiction, the small debt act opens to them a wide field, which has made it necessary to insert several articles in this summary, for which there would not otherwise have been occasion. Independently of the small debt act, they judge in the aliment of natural children, from the connexion which the subject has with the public police; and in servants' wages, by usage, resting partly upon statute; but, it appears, in no other merely civil action. Special statutes have conferred upon them jurisdiction with regard to the expence of march fences, and the straighting of marches; and also perhaps with regard to the damage done by cattle not duly herded, and which have been pointed, on account of the connexion which those matters have with the police of the country. (See *Planting and Enclosing.*) It has been doubted how far (not having civil jurisdiction) they are competent to sustain a claim of damages from an offence, *e. g.* an assault, for which they may punish, claimed by the private party in the same libel in which the fiscal or party prosecutes for punishment of the offence (for in no other situation can they entertain the civil claim of damages, except under the small debt act). Baron Hume mentions, that the Court of Justiciary have more than once sustained themselves as competent to judge in such claims, even where, by a pardon or otherwise, pleaded during the prosecution, the instance for punishment had fallen (*b*). And Mr Hutcheson's statement implies that, according to his information, this course is common before the sessions of the peace (*c*). At the same time it is understood that, in many counties, there is considerable hesitation in following it.

From the special limited nature of the jurisdiction of justices, they do not fall under the description of *Judges Ordinary*. That description belongs to those judges only, whether supreme

(a) 1617, c. 8—1661, c. 38.

(b) Hume, ii. 33.

(c) Hutcheson's J. P. 3d edit. i. 291.

or inferior, who have a fixed and determinate jurisdiction in all actions of the same general nature (*a*). It is commonly applied to sheriffs and stewarts, and to magistrates of burghs (*b*). See Preface.

In certain cases (as noticed under those cases), certain persons are disqualified from acting as justices. (See *Exercice—Colliers—Soldiers, &c.*)

Justices cannot (unless authorized by special statute) exercise their authority in any act of coercive power, or contentious jurisdiction, when out of their county. They cannot, when out of their county, bring any person before them; nor imprison a person for not finding surety of the peace; nor grant warrant for committing a person suspected of a crime; nor sign any warrant or interlocutor. But they may do ministerial acts, such as receive the statement of a party robbed, and exercise voluntary jurisdiction, any where. Voluntary jurisdiction is that which is exercised in matters which admit of no opposition; as taking affidavits in general, taking the judicial ratification of married women, &c. Contentious jurisdiction is that which is exercised in matters of an opposite description (*c*). Justices within their county have no power beyond it. Other judges are in the same situation as to their powers beyond their jurisdiction.

Justices may be indemnified for disbursements properly made for the public, by applying to the sheriff, who will present it in Exchequer; or, in certain smaller matters, by claiming from the rogue-money of the county. (See *Rogue-money*).

Justices and other judges may be prosecuted criminally, or for civil reparation, before the supreme courts. But great indulgence is shewn to them, particularly to justices, when acting *bona fide* for the public good. By one statute, a special protection is conferred, that in actions against any Justice in Great Britain or Ireland, for any summary conviction under any act of Parliament, or for any thing done by him towards carrying such conviction into effect, if the conviction shall be quashed, the plaintiff (besides any penalty levied) shall recover only 2d. without costs, unless malice and want of probable cause be expressly alleged (*d*); and that the penalty, damages, or costs shall not be recovered, if the plaintiff be proved guilty of the offence, and the punishment undergone did not exceed

(*a*) Erskine, i. 2. 15.

(*b*) See Stair, ii. 3. 62.—iii. 5, 29.

(*c*) Erskine, i. 2. 4.

(*d*) 43 Geo. III. c. 141, sect. 1. Found to extend to Scotland.—Gibsons against Murdoch and Eaton, 18th June 1817.

that assigned by law (*a*). In certain cases, however, particularly under the *Liberation Act*, justices and other judges incur penalties for error, however good their intentions. (See *Commitment for Trial.—Bail.—Liberation.—Wrongous Imprisonment.—Meditatio Fugæ Warrant.*)

See *Sessions.—Districts.—Declinature.—Courts.—Oaths.*

## LAND-TAX.

THE concern which justices of the peace have with the cess or land-tax is extremely small. It will not be necessary to go minutely into that part even of the subject which concerns them, as they will be unwilling to proceed without having the acts before them (which they can at all times easily obtain, copies being furnished by government to those called officially to act under them); particularly as frequent alterations are made. The leading enactment is the act 42 Geo. III. c. 116.

Land-tax on lands settled for the benefit of any parish or place, may be redeemed out of the poor or church-rates; if with the approbation of two justices of the peace of the county or place, certified in writing to the commissioners for the land-tax, upon notice given during divine service, on two Sundays, in the church or chapel of the parish or place, or, if there be not such, in the church or chapel of some adjoining parish, of an intention to make the application, and of the time and place of applying for the approbation of the justices (*b*). Such land-tax may be redeemed by trust-property, for the benefit of any such place, and the lands are to be charged with an annuity equal to the trust property so applied, with the like consent of justices (*c*).

(*a*) 43 Geo. III. c. 141, sect. 2.—*Note.* By the reversal of Duke of Douglas against Lockhart, 18th December 1753, the act 24 Geo. II. c. 44, conferring certain privileges on justices and constables, has been found not to extend to Scotland. The acts 7 Ja. I. c. 5; 21 Ja. I. c. 12; and 42 Geo. III. c. 85, sect. 6, which provide that prosecution against justices, mayors, bailiffs, constables, and others, having authority to commit to safe custody, can only be brought in the county where the fact was committed; or (if the fact was committed in the colonies) in Westminster, or the county of the defender's residence; and that, if the defender prevail, he is to have double costs—seem hardly to apply to Scotland. In certain special cases, however, justices and others have privileges conferred upon them by particular acts of Parliament, as to the time for bringing prosecutions against them, and other respects, *e. g.* the liberation act, some branches of the revenue, bread, &c.

(*b*) 42 Geo. III. c. 116, sect. 46.

(*c*) Sect. 47.

Penalties not exceeding L.50 (other than to the party aggrieved) may be recovered before two justices of the peace by distress and sale; and failing distress, the punishment to be six months imprisonment, unless the penalty be sooner paid. An appeal is competent from their decision to the next quarter sessions, on giving security for the penalty and costs; or, if the next quarter sessions be within six days, to the next subsequent quarter sessions. If the judgment of the justices be affirmed, the quarter sessions are to award the costs occasioned by the appeal (*a*). Witnesses refusing to appear, or to give evidence, forfeit 40s. (*b*). After six months, penalties, other than to the party aggrieved, can be pursued for only in name of the Lord Advocate in Exchequer (*c*).

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## LAWBORROWS.

LAWBORROWS (from *borgh* or *borrow*, a cautioner) is caution against injury, which, in certain circumstances, one person obtains from another, by order of a judge. The form of procedure usual before justices of the peace is to be stated here: it is somewhat different in other courts, at least in the supreme courts.

### I. CAUTION IN LAWBORROWS.

The person fearing any of the sorts of wrong, to be immediately noticed, gives in an application to a justice; and upon swearing to his dread of any such wrong, or bringing evidence of cause of fear, gets the person, from whom the wrong is apprehended, ordered to find caution; and if he do not find it within a short time (commonly forty-eight hours, or four days) gets him committed to prison till he find it. No citation of the person complained on is necessary. The applicant's swearing to his dread of harm is sufficient, without condescending upon facts, or shewing that he has sufficient cause of fear (*d*); but it seems proper that the judge ask such questions as may ascertain that the application is not made from malice or any undue motive (*e*); for it appears that, if

(*a*) 42 Geo. III. c. 116, sect. 190. (*b*) Sect. 191. (*c*) Sect. 192.

(*d*) Sellars against Anderson, 3d July 1778.—Hume, i. 363.

(*e*) Sellars, *supra*.—Smith against Baird and others, 26th January 1799, —Bank. i. 10. 167.



there should be reasonable grounds to suspect that to be the case, the person complained of ought not to be required to find caution without being heard, and some inquiry being made into the circumstances of the case.

The caution to be found is, "that the complainers, their wives, bairns, tenants, and servants, shall be harmless and skaitless in their bodies, lands, tacks, possessions, goods, and gear, and on no ways be molested or troubled therein by the persons complained on, nor others of their causing, sending, hounding out, receipting, command, assistance, and ratihibition, whom they may stop or let, directly or indirectly, otherways than by order of law and justice" (*a*). The applicant must swear to his dread of one or other of the kinds of injury here provided against (*b*). The amount of the penalty for which caution must be found is fixed by an old statute at L.2000 Scots for an earl; L.1000 for a great baron; 1000 merks for a freeholder; 500 merks for a feuar; 200 merks for an unlanded gentleman; and 100 merks for a yeoman (*c*). Those sums, however, being often inadequate, from the great fall of money, magistrates are in the practice of exceeding them, when that seems proper, particularly if specially desired by the complainer (*d*). The penalty is sometimes abated, where that seems proper, from the circumstances of the party (*e*), or otherwise.

Lawborrows are refused to the wife against the husband, unless she bring evidence of cause of fear (*f*). They are also refused to the husband against the wife, unless he bring similar evidence; but if he bring such evidence, they will be granted (*g*). In such cases, the opposite party ought to be previously served with the application (*h*). It appears that, in such cases between husband and wife, a convenient course may usually be to appoint the application to be served, and answers to be given in within twenty-four or forty-eight hours after service, under certification that otherwise a proof will be allowed: that if no answers be given in, an early diet should be appointed for taking the applicant's oath and the proof, and that this appointment should be intimated to the opposite party, in order that he may attend if he think proper: that a similar

(*a*) 1581, c. 117.

(*c*) 1593, c. 170.  
and present practice.

(*f*) A against B, 10th June 1749, Elchies, Husband and Wife, No. 32—Bankton, l. 10. 175.

(*g*) Peter Thomson, 7th March 1815.—Bankton, *supra*.

(*h*) A against B, *supra*—Thomson, *supra*.

(*b*) Stair, iv. 48. 15.

(*d*) Stair, iv. 48. 2—Erskine, iv. 1. 16.

(*e*) Stair, iv. 48. 2.

course may be followed where answers have been lodged, but are not sufficient to exclude the application : and that, upon considering the proof, the justices should grant or refuse the application according to the weight of the evidence.

## II. CONTRAVENTION OF LAWBORROWS.

When the person ordered to find caution molests the complainer, he, whether he have found caution or not, and his cautioner if he have found it, may be called in an action of contravention of lawborrows at the instance of the complainer, with concurrence of the procurator-fiscal, in order, upon proof of the injury, to have the penalty declared to be forfeited, and to have it levied. This seems competent before the justices, where one of their number has ordered the caution (*a*).

The concurrence of the procurator-fiscal is necessary ; but he cannot insist without the private party (*b*). The procurator-fiscal, however, may by himself pursue for punishment at common law, if the act of contravention was a breach of the public peace (*c*). No fine in a suit at the instance of the procurator-fiscal alone for the crime will free the offender from the process of contravention (*d*). The complainer only can pursue contravention for damage done to his wife, children, servants, or tenants (not those persons themselves, unless they have also applied for caution) ; and the contravention extends only to injury to those persons which directly affects him, as acts against lands, &c. which they held from him, or damage to their persons, which disables or discourages them in their duty to him ; but atrocious injuries against wife or children, though not directly affecting him, infer contravention at his instance (*e*).

The contravention is either against person or against property. As to person, violence or real injury seems necessary ; mere reproachful words do not seem so. As to property, vexatious deeds without violence, as frequent pasturing upon the complainer's uncontroverted ground seem sufficient (*f*). The act of contravention must have been done wittingly and wilfully (*g*).

The amount of the penalty incurred upon contravention has been already noticed. Half of it goes to the complainer, half

(*a*) Marshall against Blair, 12th March 1622, Durie—Bankton, i. 10. 177.—Analogy of Surety of the Peace.—Practice.

(*b*) Stair, i. 9. 30.—Bankton, i. 10. 172-3.

(*c*) Stair, iv. 48. 9.—Bankton, i. 10. 176. (*d*) Bank. i. 10. 176.

(*e*) Stair, iv. 48. 10.—Bankton, i. 10. 160, 163, 164.

(*f*) Dictionary, Lawborrows.—Stair, i. 9. 30.—iv. 48. 7, 13.—Bankton, i. 10. 160.

(*g*) Stair, iv. 48. 7.

to the King (*a*). Sometimes, as when the act of contravention is slight, the penalty is reduced below the sum appointed by the act, and, in favourable cases, it is sometimes restricted to the actual damage (*b*).

The process of contravention is elided or barred by circumstances inferring forgiveness, or passing from the offence (*c*); but the injury done, if a breach of the peace, may still be prosecuted criminally by the procurator-fiscal.

### III.—FORMS OF PROCEEDINGS.

#### 1. *Petition for Lawborrows.*

“ Unto the Honourable his Majesty’s Justices of the Peace  
“ for the shire of

“ The petition of A B.” [design him.]

“ Humbly sheweth,

“ That the petitioner has just cause to dread harm to himself, his family, and effects from C D,” [design him] “ he  
“ having threatened to maltreat the petitioner,” [or as the case may be, as in the text] “ to which the petitioner is ready to depone.

“ May it therefore please your honours to take the petitioner’s oath that he dreads bodily harm of the said C D;  
“ and thereafter to grant warrant to officers of court to apprehend and imprison the said C D in the tolbooth of  
“ therein to remain till he find sufficient caution acted in your  
“ honours’ court books that the petitioner, his wife, bairnes,  
“ tenants, and servants, shall be harmless and skaithless in  
“ their bodies, lands, tacks, possessions, goods, and gear, and  
“ on noways be molested or troubled therein by the said C D,  
“ nor others of his causing, sending, hounding out, receipting,  
“ command, assistance, and rathabition, whom he may stop or  
“ let, directly or indirectly, otherways than by order of law or  
“ justice; and that under such penalty as to your honours  
“ may seem proper.

“ According to justice, &c.

“ A B.”

(*a*) 1531, c. 117.

(*b*) Erskine, iv. i. 16.—Dictionary, Lawborrows.—Stair, i. 9. 30.

(*c*) Stair, i. 9. 30.—Bankton, i. 10. 173, 174.

*2. Oath of Petitioner.*

[Place and date.] “Compeared the petitioner, who, being  
 “solemnly sworn, depones that what is set forth in the peti-  
 “tion is true, and that the deponent dreads bodily harm, in-  
 “jury, and oppression from the said C D.” [or as the case  
 “may be, as in the text.] “All which is truth as he shall an-  
 “swer to God.”

“A B.”

“L M, J. P.”

*3. Order for Caution.*

[Place and date.] “The justice having considered this  
 “petition, with the petitioner’s oath of this date, grants war-  
 “rant to constables to serve a copy of the petition and of this  
 “interlocutor on the therein designed C D; and ordains him,  
 “within forty-eight hours [or] four days, &c. &c. after such  
 “service, to find caution in the books of court in terms of the  
 “prayer of the petition, under the penalty of ; with  
 “certification that if such caution is not found within that  
 “time warrant will be granted to apprehend and imprison  
 “him till it shall be found.”

[The constable serves a copy of the petition and of the de-  
 liverance, and returns an execution of such service.—See forms  
 subjoined to *Process*.]

*4. Caution.*

[This is in the same form as bail, and is in terms of the or-  
 der to find caution.]

*5. Commitment for not finding Caution.*

[Place and date.] “The justice having resumed consider-  
 “ation of this petition, oath of the petitioner, order to find  
 “caution, and execution of service, in respect that C D has  
 “failed to find caution as ordered, grants warrant to constables  
 “to apprehend him, and to commit him to the tolbooth of  
 “ , the keepers whereof are hereby ordered to re-  
 “ceive and detain him till he find such caution.”

“L M, J. P.”

6. *Action of Contravention.*

[This is in the same form as other actions before justices ; a summary petition followed by answers, &c. proof, and judgment. See *Process*.]

See *Surety of the Peace*.—*Surety for the good behaviour*.—*Threats*.

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## LEASING-MAKING.

Leasing-making is a verbal injury directed against the king, and is construed in law to be done out of malice and evil disposition against him. It includes two species of offence :—1. The invention of such rumours as are to the prejudice of the king, and may tend to lessen his estimation with his people ; for example, spreading doubts with regard to the king's title to the throne, aspersing his moral character, or misconstruing and defaming his public measures, or moving of jealousy between the king and his counsellors and servants, or other eminent and powerful persons in the state. 2. Railing and scoffing at the king (*a*).

It was at one time, by statutes, punishable capitally. It was afterwards enacted that the punishment should only be arbitrary (*b*). And by act 6 Geo. IV. c. 47, it is enacted, that, if any person shall be convicted of *leasing-making*, *sedition*, or *blasphemy*, for a first offence, he shall only be punished by fine or imprisonment, or both, at the discretion of the court ; and, for a second offence, he may, at the discretion of the court, either suffer fine or imprisonment, or both, or be banished from the United Kingdom, and all other parts of his Majesty's dominions, for such term of years as the court shall order ; that persons adjudged to be banished, not departing from the United Kingdom within thirty days after sentence, may be conveyed by the king to such parts out of the king's dominions as the king and the privy council may direct ; and that persons adjudged to be banished, being convicted of being at large in any part of the king's dominions, without lawful cause, after forty days from the sentence, and before the expiration of the term of banishment, shall be transported to such place

(*a*) See Hume, i. 337, *seq.*

(*b*) *Ibid.*

as shall be appointed by the king, for any term not exceeding fourteen years.

Justices of the peace are perhaps competent to punish for a first offence of *leasing-making*, *sedition*, or *blasphemy*, under the statute above cited. But, if they be competent, from the delicacy attending such cases, in circumstances where it is thought proper to take notice of them, they will usually be allowed to be disposed of by the sheriff. Justices of the peace appear to be incompetent to trial for a second offence, as they have not the power of banishment. They are competent to take the preliminary steps in such cases. (See *Arrest*, &c.) But, for the reason above hinted at, if there be no material prejudice expected to arise from the short delay which may be necessary for the purpose, such cases will usually be allowed to be disposed of by the sheriff.

See *Sedition*.

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## LETTER OF CREDIT.

A LETTER OF CREDIT (questions upon which may occur before justices under the small debt act) partakes of the nature of caution and of mandate. It is a letter by one person authorising an advance of money or goods to another, so as to subject the writer as cautioner for the advance. It is commonly addressed to a particular furnisher, sometimes general. Practice has varied as to the expressions which shall distinguish the letter from a mere letter of recommendation, so as to subject the writer, and has become more loose within these twenty or thirty years. It seems, in general, that a person is subjected by giving a direct mandate for the advance; or by coming under an obligation of guarantee; or by voluntarily recommending a person as a customer, as one who will pay punctually, or who will give satisfaction, &c. The letter is usually specific as to the nature and extent of the advance to be made. It seems to be in general necessary, that the person making the advance should, within a reasonable time, advertise the writer of the letter that he has done so (*a*). A letter of credit, addressed to a particular person, and authorising him to

(*a*) Rankine against Murray and Muir, 15th May 1812, and cases and authorities there cited.

trust the bearer, cannot, without the granter's consent, be handed over to any other furnisher, so as to bind the granter (*a*).

See *Caution*.—*Mandate*.—*Bill of Exchange*.

## LEWDNESS.

THERE are old statutes containing severe enactments against fornication (*b*). And justices of the peace are specially ordained to execute those acts, and to impose on every nobleman guilty, for the first fault L.400 Scots; each baron L.200 Scots; each other gentleman and burgess L.100 Scots; every other person L.10 Scots; to be doubled according to the relapses and degrees of the offence, to be levied both off the man and the woman, and to be disposed of as the fines for swearing (*c*). “But it has not, in any late instance, been thought necessary to curb this vice of incontinence by the public example of a criminal prosecution. It is not, however, to be doubted, that the keeping of an open and notorious house of lewdness, for the reception of loose and dissolute visitors, is of itself such an offence against public decency and the quiet of the neighbourhood, as is punishable at common law (and of this there are daily examples in the burgh courts) with imprisonment and whipping, or with banishment from the vicinity to which the scandal or disturbance has been given” (*d*). (See *Punishments*.)

All open lewdness, grossly scandalous, such as was that of certain persons, who exposed themselves naked to the people in a balcony in Covent Garden, with most abominable circumstances, is an offence at common law in England (*e*). The common law of Scotland, which is more vigorous, must also reach any offence of that nature. It seems to authorize the punishment of prostitutes or their paramours, who are guilty of any gross public annoyance or indecency. It is the opinion of a professional magistrate of great experience, that although the modern practice of the law did authorize any proceedings against prostitutes, merely for being such, it would be cruel and impolitic to use them (*f*).

(*a*) Phillips against Melville, 21st February 1809.

(*b*) 1696, c. 31, and acts confirmed by it.

(*c*) 1661, c. 38.

(*d*) Hume, i. 465.

(*e*) Hawk. l. c. 5, sect. 4.

(*f*) Colquhoun's Police of the Metropolis, chap. 12.

Adultery, which, by certain statutes, was punishable arbitrarily in some cases, and capitally in others, has not for a long time been made the subject of criminal prosecution.

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### LIBERATION ON ACT 1701, c. 6.

As the accused, on being committed for trial, may not be entitled to *bail*, or may not be able to find it, the important statute 1701, c. 6, commonly called the *Liberation Act*, makes provision to enable him to hasten his trial, or to obtain liberation, by *running his letters*, as it is commonly called. He must be a "prisoner" in actual custody at the time; and it must be "custody in order to trial," not custody for further examination merely.

#### 1. FIXING DIET.

The statute provides that, upon application of "any prisoner for custody in order to trial, whether for capital or bailable crimes, to any of the Lords of Justiciary, or other judge or judicatory competent for judging the crime or offence for which he is imprisoned" (*a*); and upon his producing the double of the warrant of his commitment under the keeper's hand, such judge or judicatory shall, within 24 hours (after receiving the application, or knowing of its being presented) under the pains of wrongous imprisonment (mentioned afterwards) give out precepts to messengers to intimate to the Lord Advocate, or procurator-fiscal, and the party appearing by the warrant to be concerned, if such there be, to fix a diet for the trial "within sixty days after the intimation," under certification, that otherwise the prisoner shall be released; and that if the diet be not fixed accordingly, the judge shall immediately release the prisoner, unless the prisoner desire delay (*b*).

The proper time for applying is as soon as the prisoner stands fully committed for trial, except in the case of treason, in which the prisoner is denied this privilege for 40 days after

(*a*) Application to the sheriff of *one* county by a person committed for a robbery in *another*, has been found inept.—Hume, ii. 98.

Application is seldom made to Justices of the peace.

(*b*) Hume, ii. 97, *seq.*



commitment (*a*). The application ought to be in writing, and the hour of lodging it with the clerk ought to be authenticated by him, and the hour at which the clerk lays it before the judge ought to be authenticated by the judge, or by the clerk under his eye (*b*). Although, in the ordinary case, application for intimation may be made to any "judge competent" for judging of the offence, the application must be made to the Court of Justiciary where the warrant of commitment proceeds from that Court on the application of the Lord Advocate (*c*). It is very doubtful whether that be necessary where the warrant from that Court has been obtained by a private party (*d*).

When any prisoners serve the procurator-fiscal with intimation under the act 1701, it ought to be transmitted to the crown agent without the delay of a post; and the utmost exertions ought to be made to complete and transmit the precognition, if that has not been previously done (*e*).

It is sufficient that the fixing of the diet be within 60 days by executing process. It is not necessary that the diet of appearance itself be within that time; but it must be within the period after noticed, for concluding trial, in continuation of the 60 days (*f*).

On the prosecutor failing to fix the diet, the prisoner must make a written application to any of the "Lords of Justiciary, or judge competent *respective*," who, upon his application and instructing the fact, must, within 24 hours, issue a precept or warrant to liberate him.

The prisoner liberated on this ground cannot be again committed or tried for the same offence (unless on new criminal letters before the Court of Justiciary (*g*)) under the penalties of wrongous imprisonment (mentioned afterwards) if the judge or jailor knew of the former liberation. If the judge or jailor were excuseably ignorant of it, they are not liable; but upon production of the prisoner's former warrant of liberation, the jailor must *forthwith* set him at liberty.

## II. CONCLUDING TRIAL.

The statute then provides that, if a diet of trial be fixed within 60 days after intimation, the magistrates or keeper of the prison shall deliver the prisoner to a sufficient guard, to be provided by the judge or public prosecutor, that the prisoner

(*a*) Hume, ii. 102.

(*c*) Ibid.

(*d*) Ibid. 21st Feb. 1824.

(*b*) Ibid.

(*e*) Rules by King's counsel for precognitions, 21st Feb. 1824.

(*f*) Hume, ii. 104-6.

(*g*) Ibid. 98, *et seq.*

may be sisted before the judge competent ; and that his trial shall be brought to a conclusion within 30 days, if before an inferior judge (40 days if before the Court of Justiciary) ; and that, if the process be not insisted in at the day appointed, and brought to a conclusion in the time mentioned, the diet shall be deserted, and the prisoner shall be immediately liberated from his commitment for that crime. The 30 days must begin to run from the expiration of the 60, so that the prisoner shall not be confined above 90 days in all, though the diet of appearance be several days after expiration of the 60 days ; but if the diet fall within the 60 days, the prosecutor thereby abridges his time, as he can only have 30 days after the diet (*a*). In computing the 30 days, deduction must be made of the delays granted at the desire and for the accommodation of the accused. It seems, however, that the prisoner's request for this delay ought to appear in some plain form on the record ; for it will not be sufficient that he has simply moved some plea on which the court hesitate, and take farther time to be resolved, or order additional arguments or inquiry (*b*).

If the prosecutor do not insist at the diet appointed, or do not conclude the trial within the limited time, the prisoner must apply for his liberation to the Lords of Justiciary, or "judge competent *respectivè*," who are directed to proceed in the same manner as where the prosecutor has failed to fix a diet. A sheriff may therefore liberate a prisoner whose trial has been going on before the supreme court ; but (it appears) under the provision that the letters of intimation have issued under the sheriff's own precept ; for it is thought that if intimation was made to the Lord Advocate under a precept from the Court of Justiciary, the proceedings ought to follow in the same course (*c*).

If either of those objections be stated and established during the proceedings of court, in trial of the case, the prisoner ought to be immediately liberated.

A prisoner liberated on this ground is in the same situation as when liberated on the ground of no diet having been fixed.

The magistrate refusing, or unduly delaying to grant any of the orders required of him under the statute, and the gaoler or other person failing to pay due obedience to it, are liable to the party in the penalties of wrongous imprisonment. Those, in the case of detention after the sixty or thirty days, are declared to be, for a nobleman L.100 Scots (L.8. 6s. 8d. ster-

(*a*) Hume, ii. 104, *seq.*

(*b*) Ibid. 107.

(*c*) Ibid. 111, 112.

ling) for each day that he is wrongfully detained ; for a landed gentleman L.66. 13s. 4d. Scots (L.5. 11s. 1 $\frac{1}{2}$ d. sterling) for each day ; for a burgess or other gentleman, L.33. 6s. 8d. Scots (L.2. 15s. 6 $\frac{1}{2}$ d. sterling) for each day ; and for an inferior person, L.6. 13s. 4d. Scots (11s. 1 $\frac{1}{2}$ d. sterling) for each day. In all other offences against the act, the reparation is struck at a gross sum, viz. for a nobleman, L.6000 Scots (L.500 sterling) ; for a landed gentleman, L.4000 Scots (L.333. 6s. 8d. sterling) ; for a burgess or other gentleman, L.2000 Scots (L.166. 13s. 4d. sterling) ; and for any inferior person, L.400 Scots (L.33. 6s. 8d. sterling). Those penalties cannot be restricted. They are recoverable in the Court of Session. There is a farther penalty (which seems only applicable to illegal detention after the sixty or thirty days) that the person guilty shall lose his office, and be declared incapable of public trust ; but it is presumed this penalty would be inflicted only in the case of gross and wilful wrong.

None of the provisions of this act, of course, avail the prisoner farther than relates to the particular crime in the warrant to which he refers in his application for intimation.

For other provisions of the liberation act, see *Commitment for Trial*.—*Bail*.—*Wrongous Imprisonment*.

For liberation of debtors, see *Imprisonment*.

## LINT, STEEPING.

As the steeping of lint in lochs or burns renders the water hurtful to the fish which are in it, and to the cattle which drink of it, and unprofitable for the use of man, and noisome to the neighbourhood, it is forbidden, under pain of 40s. Scots for each offence, and confiscation of the lint to the poor of the parish in which the loch or burn lies (*a*). The execution is entrusted to “sheriffs and other magistrates, and their deputies,” &c. and “all our judges before whom our masters of “the game or others shall pursue the contraveners” (*b*). It is doubted how far justices are competent (*c*).

In a case in which a person dug pits for watering flax within a few yards of a rivulet through which the water passed

(*a*) 1606, c. 13, revived by 1685, c. 20.

(*b*) 1685, c. 20.

(*c*) See *Pigeons*, Note on 1576 and 1597.

from and to the rivulet in a continued stream, the court, in interpreting the act 1606, c. 13, before cited, "thought that "persons steeping lint were entitled to take water from a running stream for the use of their lint-holes, and to renew the "water therein from time to time, when necessary; but were "not entitled to divert the course of any part of a rivulet into "a lint-hole, in the manner here followed" (a).

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### LOAN.

A LOAN (questions on which may arise before justices under the small debt act) may be given either of a subject which cannot be used without its extinction or alienation, as corn, money, &c. which is strictly called *mutuum*; or of a subject which may be used without its extinction or alienation, as a horse, a book, &c. which is strictly called *commodatum* or *commodate* (b).

In *mutuum*, as now described, the property passes to the borrower, who is bound to restore as much of the same kind (c) with interest, if bargained for. If the subject perish, or be damaged by accident, the borrower must nevertheless restore as much in kind. Where the borrower fails to restore, the estimation of the value must be made according to the price which the subject would have brought at the time and place agreed on for restoring; or, if these were not fixed, at the time and place at which the demand was made. The lender has action for restoring as much, and of as good quality, as was borrowed, and for repairing any damage which has arisen from the borrower's delay to restore (d). An agreement to lend money cannot be proved by witnesses; nor indeed any merely gratuitous promise, however small the amount (e). Nor can the receipt of a loan of money be proved by witnesses (f). A judicial examination cannot be taken in such a case; nor in any case in which parole evidence is excluded. If the writing be not *probative* (see *Proof*, sect. Civil, Writ-

(a) *Kinloch against Ogilvie*, 27th November 1781.—*Note*. An act, 13 Geo. I. c. 26, prohibiting the steeping of hemp or flax in bog holes, peat mosses, or turf pits, &c. was, along with several other acts relative to the linen manufacture, repealed by 4 Geo. IV. c. 40.

(b) *Erskine*, iii. 1. 18.

(d) *Erskine*, iii. 1. 19.

(f) *Creditors of Gray against Grant*, 1st December 1789.

(c) *Ibid.*

(e) *Ibid.* iv. 2. 20.

ing) the whole libel must be referred to oath ; which must be taken with all its intrinsic qualifications.

In *commodate*, as above described, the property does not pass to the borrower : so that, if the subject perish or become worse, the loss falls on the lender, unless it was occasioned by the borrower's fault (*a*). The borrower must be allowed to retain the subject till the time limited by the contract be expired, or the purpose of the contract be answered. If he fail to restore it then, or if he put it to a use different from that for which it was lent, he is liable for the loss or deterioration of the subject occurring during such delay or such improper use, though arising from mere accident (*b*). The lender must repay to the borrower permanent or casual expences disbursed on the subject, as medicine for curing a horse ; not expences inseparable from the use of the subject, as feeding a horse, or shoeing him on a journey (*c*).

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## LOCATION.

LOCATION (questions on which may arise before justices under the small debt act (*d*)) is a contract in which a hire is agreed upon for the use of a moveable subject, or for the work or service of persons. It is governed nearly by the same rules as *Sale* (*e*).

With regard to the general obligations of the lessor, or person who lets his subject or labour to hire, he is bound to procure and to continue the free enjoyment of the subject to the lessee ; and to deliver it in such condition as to answer the purpose for which it was let. If, by some fatality, not imputable to him, he cannot give possession, he is not liable in damages, but has no claim for hire (*f*). If the lessee be kept or turned out of possession by the fault of the lessor, as by his having, after the contract, sold the subject to another, without properly securing the lessee's interest (for unless specially secured, in such a case, the lessee's right of possession ceases (*g*))

(*a*) Erskine, iii. 1. 20.

(*b*) Ibid. 22.

(*c*) Ibid. 23.

(*d*) For certain acts of Parliament applicable to location of service which do not appear to extend to Scotland, see *Apprentices*, Foot note.

(*e*) Erskine, iii. 3. 14.

(*f*) Ibid. 15.

(*g*) Ibid. 14.

he not only loses the stipulated hire, but is liable in damages (*a*). He is bound to pay to the lessee the necessary and profitable expence disbursed by him on the subject (*b*). If a mechanic or workman, who lets his labour or service, and undertakes to work up materials, from carelessness neglect the work, or from unskilfulness spoil it, he is liable in damages. But if the non-performance cannot be imputed to his fault, but be occasioned by the other party, he is entitled to the full wages agreed upon (*c*). If the materials perish in his hand by an accident, without blame, he is not liable for their value, but seems to have no claim for hire.

As to the general obligations of the lessee ; he is bound to use the subject well ; to put it to no other use than that for which it was let ; to preserve it in good condition during his right of possession ; to restore it to the lessor when that right ceases ; and to pay him the hire agreed upon (*d*). The proprietor of a horse let is not bound to prove actual maltreatment of it while it was out of his possession : it is sufficient that he gave it sound, and received it injured, unless the hirer can prove that the injury arose from a blameless accident (*e*).

With regard to the conveyance of goods by a *carrier* (an instance of this contract, on which, from its frequent occurrence before inferior courts, it seems proper to make a few separate remarks) the carrier, if the goods be damaged or lost, must prove that no reasonable blame was imputable to him. If he received special instructions, he must rigidly obey them (*f*). It is immaterial whether the goods be delivered to the carrier personally, or to his servant, or be left for him at his established quarters. The owner must give a proper account of the goods at lodging them ; and must give them a distinct address. Articles peculiarly valuable or brittle, as money, jewels, plate, writings, glass, &c. must be entered and paid for as such, otherwise the carrier is not liable : which in many cases is specially provided for by the carrier's advertisements. If a parcel be entered as valuable or brittle, the carrier may insist to see that it is as valuable as it is entered, or that it is entire ; otherwise, in the case of loss or breaking, the presumption will be against the carrier ; which, however, he may overcome by proof to the contrary (*g*). Where the carrier, which is very

(*a*) Erakine, iii. 3. 15.

(*b*) Ibid. 16.

(*c*) Ibid.

(*d*) Ibid.

(*e*) Robertson against Ogle, 23d

June 1800.

(*f*) Lady Glasgow against Janet Thermes, 12th December 1758.

(*g*) Sprott against Brown, 15th June 1803.

common, gives notice that he is not to be liable for any parcel above a certain value, *e. g.* L.5, unless entered and paid for accordingly, he seems not liable even to that amount, for such a parcel not so entered and paid for (*a*). Where the notice is, that he will not be responsible beyond the limited value, for loss or damage of goods of greater value, unless entered and paid for according to their value, he seems liable for the limited value (*b*). The responsibility of the carrier ceases when he has delivered the subject as addressed; or, if that be beyond his line of carriage, when he takes it to the end of that line, and gives it to the next carrier who goes onward towards the place of destination (*c*), from whom he ought (in prudence at least) to take a receipt as evidence. If the carrier leave the goods short of the place to which he was bound to carry them, he has no claim for hire corresponding to the distance which he has carried them. As to the evidence of a carrier having received a parcel, *booking* is almost an universal custom; but it hardly appears that there is sufficient authority for excluding proof by witnesses, if clear and strong, unless perhaps in the case of there being a regulation or understanding to that purpose in the particular place or trade.

It has been found in England, that a common carrier is as much bound to carry goods as an innkeeper is to lodge a guest (*d*); and that a common ferryman is bound to carry passengers (*e*). It has been found, in this country, that the publication of a table of freights by lightermen, or other carriers, binds them to serve at those rates, when called upon, so as to subject them to a fine in case of refusal (*f*). In the Scots case, just cited, there was not occasion to decide the general point how far they would have been bound independently of the publication of the table, and the Court avoided giving any opinion upon it; but it seemed to be in some measure admitted in the argument that the obligation of such persons stands on the same footing here as in England.

The powers conferred on justices of the peace and magistrates, by certain acts of Parliament, to rate the wages of servants, and to fix the prices of work for artificers, labourers, and craftsmen, are now taken away, and all orders under those

(*a*) This has been found in England. *Izet v. Mountain*, 4 East. Rep. 371.—*Nicholson v. Willan*, 5. East Rep. 507; 2. Smith's Rep. 107.

(*b*) This has also been found in England. *Clark v. Gray*; *Marsden v. Gray*; 6 East. Rep. 564.

(*c*) *Denniston* against *Harkness*, 15th January 1791.

(*d*) *Shower's* Rep. 104.

(*e*) *Hardress*, 163.

(*f*) *Campbell* against *Ker*, 24th February 1810.

acts are declared to be void (*a*). Even before the acts cited were passed, the House of Lords were of opinion that the justices had no right to fix the rate of posting (*b*); although, in the particular case, they sanctioned the control which had been exercised, on account of an illegal combination which had taken place.

For higher responsibility in certain cases of location, see *Nauta*, &c. For the location of immoveables, see *Tack*. See Innkeepers, at conclusion of *Alchouses*. See *Servant*. See *Mandate*. See *Combination*. For compelling workmen by imprisonment to return to their service, See *Imprisonment*.

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## LOTTERIES.

WITH regard to public lotteries, there are usually a few provisions, in the act for each lottery, which concern justices. But as a new act is commonly passed every year, and as there is seldom occasion in Scotland to make application to the magistrates, it is sufficient to mention, that usually it is made felony to forge or vitiate certificates, orders, &c.; that usually persons not licensed for distributing, by the directors of the lottery or of the stamp-duties, selling a chance of a ticket for less than the whole time of drawing, or making insurance against drawing a ticket, or publishing any proposal for such purposes, may be sent to the correction-house by two justices, from one to six months, and till the end of drawing the lottery (licenced persons usually forfeiting L.50 for this offence); that usually persons not licenced as above, taking down or publishing the number of tickets drawn, &c. forfeit L.5 before a justice on oath or affirmation of one witness; and that usually the pecuniary penalties (of which there are commonly many) can only be pursued for in Exchequer by the Lord Advocate, unless excepted. There seem to be no general standing regulations on public lotteries which appear to concern justices in Scotland; several acts of Parliament of this description being either originally limited to England, or, if they ever extended to Scotland, having been repealed as far as regards execution in this country (*c*).

(*a*) 53 Geo. III. c. 40.—6 Geo. IV. c. 129, sect. 2.

(*b*) *Scott against Smith and others*, 5th July 1796; affirmed 8th January 1798.

(*c*) In particular, 22 Geo. III. c. 47, at one time extended to Scotland; but 27 Geo. III. c. 1, sect. 2, made it impossible to execute it here.



With regard to private lotteries, it has not been decided whether they may not be removed as nuisances at common law. The Court of Session, in the only reported case on the subject, continued an interdict granted by an inferior court against a hardware merchant, who had advertised a private lottery of his goods, and passed a bill of advocacy to try the question (*a*). Several of the judges are reported to have expressed opinions in favour of the judgement of the inferior court, as far as founded on common law (*b*). The merchant does not seem to have proceeded in the question. But the matter seems rather to fall under the jurisdiction of the judge ordinary than of justices.

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## MANDATE.

MANDATE (questions with regard to which may occur before justices under the small debt act) is a contract by which one person employs another to do a lawful thing for him. The employer is called the mandant; the person employed, the mandatary, sometimes an attorney or factor (*c*).

### I. CONSTITUTION AND EVIDENCE OF THE CONTRACT.

The consent is either direct or implied. Direct consent is given either expressly by words or writing, or tacitly by knowing of the actings of the mandatary, and not expressing dissent, (*d*) or by approving of them in some such way. Implied consent is that which is presumed in certain situations from the circumstances of the parties; of which some instances are mentioned at the conclusion of this article.

Mandates with regard to ordinary moveables, the sale of which is provable by witnesses, may, in like manner, be proved by witnesses (*e*). Mandates with regard to money, for instance a mandate to a debtor to pay his debt to a third party, must be proved by the writ or oath of the mandant, where there is a *nuda emissio verborum* (no evidence of the fact ex-

(*a*) Fraser against Sprott, 7th July 1796; Dict. iv. 34.

(*b*) Hutcheson's J. P. 3d edit. ii. 361. The Court are reported to have had no doubt that 27 Geo. III. c. 1, sect. 2, on which, as well as at common law, the inferior court proceeded, did not extend to Scotland. *Ibid.*

(*c*) Erskine, iii. 3. 31.

(*d*) *Ibid.* 33.

(*e*) Scott, 29th January 1667.—Thomson, 21st July 1668.

cept a verbal order); but where the mandate can be established by a train of facts and circumstances, evidence of these by witnesses is admitted. Thus, in the case of a servant taking goods from a shopkeeper in his master's name, it will be sufficient if the shopkeeper can prove that the master knew of the servant taking goods in his name on former occasions, and received and paid for the goods so formerly ordered. In like manner a person paying an account to the shopkeeper's clerk is safe, if this be proved or admitted to be the daily practice of the shop. In the same way, a mandate to a messenger to receive payment of the debt for which diligence is done, or proposed to be done, is sufficiently proved by the grounds of debt being in his hands, when joined to the creditor having, on former occasions, employed him to receive debts; and this fact may be established by parole evidence. And so of other similar cases.

## II. NATURE OF THE CONTRACT.

### I. *Obligations and Powers of Mandatary.*

Where the mandate prescribes a mode of doing the thing, the mandatary must observe it strictly, otherwise he is answerable for any damage which ensues from the deviation, though the course which he followed seem more rational (*a*). It makes no difference whether the course to be followed be pointed out by particular instructions, or by the custom of the trade; for the latter are presumed to be the mandant's instructions. Where no rules are laid down, the mandatary must conduct himself as prudence directs; in which case he is safe, whatever be the success (*b*). Mandates are sometimes conceived in general terms for the management of the mandant's affairs. Such a mandate gives no authority to gift the mandant's property, or to sell his moveables, unless they be of a perishable nature, or to transact or submit doubtful claims, or, where particular cases are expressed, to do things of a different kind (*c*). Where the mandatary acts properly, he binds the mandant, and not himself, and transfers the whole risk to him. A mandatary, who plainly exceeds the limits of his commission, is liable for every accident arising through occasion of such excess. While the goods or money in right of the mandant, which are in the hands of the mandatary, or due to the mandatary, are distinguishable from his other goods or funds, the mandant

(*a*) Erskine, iii. 3. 35.—*Harle against Ogilvie*, 24th January 1749; *Kilk-Periculum*, 4.

(*b*) Erskine, iii. 3. 35.

(*c*) *Ibid.* 39.

has a direct preferable right to them ; the mandatary being considered as a servant acting solely for another (*a*). A mandatary ought not to convert the mandant's money to his own use, or to transfer the property of any of the mandant's effects to himself ; and if he take an obligation in his own name for a sum which truly belonged to the mandant, a direct action is competent to the mandant against the debtor, even though the creditors of the mandatary be in the field (*b*). If the mandatary buy goods for himself with the mandant's money, the mandant has no direct action for those goods, but he has action of damages against the mandatary (*c*). He must communicate the benefit or ease allowed him in any subject naturally connected with the subject of the mandate (*d*).

With regard to the degree of diligence to be adhibited by the mandatary, according to the common rule in contracts, it is this. If he act gratuitously, he must still give as much attention as in his own affairs, otherwise he is liable for the damage (*e*). If he be recompensed, whether by a special hire, or by the matter in question being part of an onerous transaction, he must adhibit that degree of diligence which is customary in the particular branch of business. If the thing to be done be in the line of his own profession, and if he be recompensed, he is still more bound to exact diligence, particularly if the special thing to be done be pointed out ; so that, if he either neglect it altogether, or delay it, he is liable for the damage (*f*). A professional mandatary is liable for errors ; but it is only for gross errors, such as a person of ordinary skill could not be supposed to commit ; not errors of judgment in nice cases (*g*).

The powers of the mandatary are such as are necessary to enable him to perform his duty in an ordinary and reasonable way. He cannot, in the ordinary case, and in the material parts of the business, authorise a person to act as his substitute ; if he do, he is accountable for the damage arising to the mandant from the unfitness or unskilfulness of the substitute (*h*). The mandatary may, if he see cause, act in his own name, without mentioning the mandant, and yet acquires rights to

(*a*) Hay against Hay, 15th March 1707 ; Forbes—Street against Hume, 9th June 1669 ; Stair.

(*b*) Erskine, iii. 3. 34.

(*c*) Ibid.

(*d*) Ibid. 35.

(*e*) Earl of Wemyss against Sir William Thomson, 17th July 1672 ; Stair.

(*f*) Garden and Donaldson against Pilmore and Lindsay, 30th January 1724 ; Edgar—Maeson against Thom, 4th February 1787,—and many others.

(*g*) M'Lean against Grant, 15th November 1805.

(*h*) Erskine, iii. 3. 34.

the mandant, and binds him as effectually as if that person had been named. Thus, that kind of itinerant mandatary or factor called a *traveller* or *rider* effectually binds the shopkeeper commissioning goods to receive them and to pay the price, and his employer to send them, though he do not mention his employer's name (*a*).

If any thing happen which would make the execution of the mandate hurtful to the mandant, the mandatary ought not to execute it.

### 2. *Obligations of Mandant.*

The mandant must replace to the mandatary all reasonable expence disbursed *bona fide*, and the damage sustained by him in the execution of the mandate; and must relieve him of any obligations under which he may have come on account of the mandate, and must give him the stipulated gratification for his trouble, even though the mandate proved unsuccessful (*b*), unless the risk was transferred as before mentioned. The mandant must pay a due regard to the interest of the mandatary. If, for instance, he have any objection to the goods sent, he must give timeous notice that he intends to return them, and must refrain from using them, otherwise the bargain is fixed down. If a mandatary pay a price beyond that allowed in his commission, the mandant must relieve him of the bargain, if he restrict his demand to the sum allowed (*c*). When no reward is stipulated, the commission is presumed to be gratuitous, unless a stronger contrary presumption, for a reward, arise from the special circumstances of the mandatary, or his way of life (*d*).

### III. TERMINATION OF CONTRACT.

Mandates expire, 1. By the revocation of the mandant, either express or implied, as by the appointment of a new mandatary: but the revocation, in order to have full effect, must be intimated to the former mandatary; and matters must be entire; for if the mandatary have, for example, bound himself to purchase goods from a third party, the mandant must relieve him.—2. By the renunciation of the mandatary, even though he have in part executed his commission; but if he do not immediately notify his renunciation to the mandant, he is liable for any damage occasioned by the delay; and he is also liable in damage if he renounce at a critical time, which

(*a*) Milne against Harris and Company, 14th June 1803.

(*b*) Erskine, iii. 3. 38.

(*c*) Ibid. 36.

(*d*) Ibid. 32.

must naturally be attended with damage.—3. By the death of the mandant. But if a mandatary, ignorant of the mandant's death, go on to execute the commission *bona fide*, his actings bind the mandant's heir; and if part of the commission was executed before the mandant's death, so that the management would suffer if the whole were not to be carried into immediate execution, the mandatary ought to proceed, even though he knew of the mandant's death (*a*).—4. By the death of the mandatary. But if he had begun a course of management which required to be carried through without delay, his heir may finish it (*b*).

#### IV. IMPLIED MANDATE.

##### 1. Shipmaster.

*Exercitors*, i. e. persons who employ a ship for trade, on their own account, are answerable for all repairs, provisions, or furniture, necessary for the ship or crew, ordered by the master of the ship, or by the person who has the actual charge of the ship, though he should have no commission as master (*c*). Exercitors are liable, whether the master has purchased the necessary articles with his own money, or has borrowed money for that purpose; but the furnisher or lender must be able to shew that the furnishings to the extent made were ordinary, necessary, and proper; and that they were truly made with a view to the good of the concern. It is not necessary that he shew the furnishings to have been properly applied. Where the furnishing is borrowed money, the bond ought to specify the cause of borrowing. Exercitors are not obliged by the master's contracts concerning things not entrusted to him, and, therefore, not by his contracts concerning the cargo, if, as is now usual, that be entrusted to a supercargo; but in such case the supercargo can bind the owners (*d*). Thus, the owners having appointed a master to navigate a vessel, in conveying materials for building, were found not to be bound by an obligation of his with regard to grain received on board (*e*). The shipmaster binds himself as well as his owners (*f*). The owners are liable *singuli in solidum*, each for the whole; the owner paying more than his share having of course proportional relief against the others. A shipmaster's obligations for borrowed money bind his employers, only if the advance was made in a foreign port; his obligations for other furnishings to the

(a) Erskine, iii. 3. 40, 41.

(b) Ibid 41.

(c) Ibid. 43.

(d) Ibid. 43-45.

(e) Masson against Adams, 11th Jul y 1758; Kames.

(f) Erskine, iii. 3. 46.

vessel bind his constituents, even though those furnishings were made at a home port (*a*). It has been doubted whether obligations of this kind by shipmasters, being of a maritime nature, can be competently tried before any other courts than those of admiralty. Both of the cases cited were originally brought before courts of admiralty.

## 2. *Conductor of concern on shore.*

*Prepositors*, or undertakers of any business on land, from which profit may be expected, as a farm, manufactory, shop, &c. may be sued upon contracts with regard to it entered into by their *institors*, or those whom they have set over it. Prepositors are not bound beyond the commission which they have given to the institors, unless the institors have been in the course of managing that business for a tract of time, the prepositors all the time fulfilling their contracts relating to it. Institors disclosing their character, bind their constituents, and not themselves, except in so far as they are in possession of the money belonging to the prepositors (*b*). Institors cannot depute their commission, as shipmasters can; there is not the same necessity that they should be able to do so. If the prepositors have furnished money to the institors to buy goods, the furnisher of those goods to the institors has no action against the prepositors, on the institors turning aside the money, if the trade in question was notoriously a ready money trade (*c*).

## 3. *Servant.*

A servant has, in certain cases, an implied mandate to order goods for his master. If the master run an account with the tradesman, or if he be irregular in his dealings, sometimes paying in ready money, sometimes not, he is answerable for all that the servant orders, of a reasonable kind and degree, even though it have been turned aside by the servant. But, on the other hand, if the master have been regular in dealing with the furnisher in one particular way, he is not answerable for goods ordered by his servant upon a quite different footing. For example, if he have been in the use of dealing personally with the tradesman, or in ready money through his servant, and if, in fact, he have supplied the servant with money for the occasion, he is not liable for what the servant has taken upon

(*a*) *Lindsay and Allan against Campbell*, 18th June 1800.

(*b*) *Erskine*, iii. §. 46.

(*c*) *Hunter against Chalmers and Company*, 4th January 1766; *Kamea*.

credit only, having turned aside the money, even though the articles have been brought into his house, and there consumed (*a*).

#### 4. *Advocate and Procurator.*

A mandate to appear judicially in name of a party to a suit (which, however, is excluded under the small debt act, but may take place in other questions competent before justices) is implied or presumed with respect to an advocate, from his mere appearance in court for the party: and with respect to a procurator before an inferior court, from his being in possession of the party's writings (*b*). But it has been found that a procurator before an inferior court cannot refer the libel to the oath of the opposite party, without a special mandate to that effect (*c*).

For a wife's mandate to order goods for the family, see *Marriage*, sect. Obligations by Wife. For a mandatary for a pursuer abroad, see *Parties*, sect. Pursuer.

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## MANUFACTURES.

Those points only which are of more general importance are noticed here. The few justices who require the details on particular manufactures, such as linen, woollen, leather, &c. can procure the subsisting regulations.

### I. BREAKING INTO HOUSE, &c. TO DESTROY MANUFACTURES, &c.

Any person, by day or by night, breaking into or entering by force into any building with intent to destroy or damage any goods, wholly or partly composed of woollen, silk, linen, or cotton, in the loom or frame, or in any stage of manufacture; or to destroy or damage any loom or other implement used for such manufacture; or wilfully and maliciously destroying or damaging any such goods or implements; or aiding and abetting others in committing any of those offences, is by

(*a*) Inches against Elder, 22d November 1793, in Hutcheson's J. P. 3d edit. ii. 165.

(*b*) Erskine, iii. 3. 33.

(*c*) Hardy against Allan, 4th January 1709; Fountainhall; Forbes.—Ingis against Fuller, 18th January 1712; Forbes.—Grahams against Ferguson, November 1775; Dict. iv. 153.

statute subjected to an arbitrary punishment, which may amount to transportation for life (*a*). Such offences seem also punishable at common law; and some of them may amount to wilful fire-raising, or to theft by housebreaking, so as to be capital. Justices may arrest those guilty, and take precognition. See *Arrest, &c.—Crime*, sect. Wrongful act necessary.—*Mischief, malicious*.

## II. EMBEZZLING MATERIALS, TOOLS, OR DRUGS.

A number of statutes have been passed upon this subject applicable to different manufactures. These, having been passed chiefly with a view to England, are, many of them, not very easily executed in this country; and they are not necessary in this country, as all such offences are effectually reached here by the vigour of the common law. Many of these statutes, too, are not very congenial to the common law of this country; for instance, convicting upon the oath, or, in the case of a quaker, the affirmation, of a single witness, who may, in some cases, be the owner of the goods embezzled. There is an immense number of these statutes for the different manufactures, differing from each other in many minute particulars, without any apparent reason, or any discoverable general rule, and sometimes modifying each other in such a manner that it becomes extremely difficult to apply them in practice (*b*). The punishment of whipping, too, which many of them order, has hardly ever been inflicted in this country by justices. See *Punishment*. It is understood that they are very seldom acted upon in this country. It seems unnecessary to say more with regard to the statutory law upon this point. For the common law, see *Theft—Falsehood, &c.—Proof—Punishment, &c.*

## III. CONTRACT BETWEEN MASTER AND SERVANT

### 1. *Fulfilment of it, in certain manufactures.*

By various statutes, the execution of which has been committed to justices, provision has been made that servants engaged in different manufactures shall serve out the time, and finish the work undertaken by them, under the sanction of

(*a*) 4 Geo. IV. c. 46, sect. 2.

(*b*) Regulations as to a great number of manufactures, those of woollen, linen, cotton, iron, leather, &c. are contained in the following acts, 12 Geo. I. c. 34.—13 Geo. II. c. 8.—22 Geo. II. c. 27.—17 Geo. III. c. 56.—particularly this last, which, though Lord Swinton doubts whether it extends to Scotland, has lately been founded on without challenge; Mackay, Skirving, and Co. against Bond, 19th November 1813.



being committed to the house of correction or to gaol; and that masters shall pay wages in money, under the sanction in some instances of being liable in double wages, and, in certain cases, penalties. There are particularly such provisions with regard to woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, silk, coals, steel, &c. (*a*). It appears, however, that such cases may, in general, in this country, be left to the common law, by which the servant will lose his wages and character, and may be subjected in damages and expences (see *Imprisonment*); and the master will be subjected in the full wages and expences. If these statutes should at any time be founded upon before justices, which can happen only before few justices, and will probably not often happen before any, the subsisting statutes on the manufacture in question must be produced (*b*). It has been decided that master-manufacturers cannot plead compensation upon commodities furnished on account to their workmen, during their service, against a claim for wages, which, by statute, must be paid in current coin (*c*).

For the general attributes of the contract, see *Servant*.

## 2. Arbitration of disputes between Masters and Workmen.

A general act has been passed, applicable to every description of trade or manufacture (repealing former partial acts) by which justices of the peace and other magistrates are authorised to settle and adjust certain subjects of dispute between masters and their workmen, by reference to the justice or magistrate, where the parties both agree to do so, and otherwise by the justice or magistrate, to whom application is made, appointing referees, and proceeding in a manner prescribed by the act (*d*). This matter concerns very few justices; and when a justice is called upon to proceed under the act, it will, of course, be produced to him; so that it is unnecessary here to go into detail.

See *Combination*.

## IV. HEALTH, AND INSTRUCTION OF MANUFACTURERS OF COTTON AND WOOLLEN.

Certain acts have been passed on this subject, the execution

(*a*) 12 Geo. I. c. 34.—13 Geo. II. c. 2.—22 Geo. II. c. 27.—17 Geo. III. c. 56. But Lord Swinton doubts whether this act extends to Scotland.—57 Geo. III. c. 115.—57 Geo. III. c. 122.—58 Geo. III. c. 51.

(*b*) For certain statutes applicable to artisans which do not appear to extend to Scotland, see *Apprentices*. Foot note.

(*c*) Monteith and Co. against Blackie, 2d February 1827.

(*d*) 5 Geo. IV. c. 96.



of which is partly committed to justices, applicable to cotton and woollen mills, and cotton and woollen factories. But as they concern very few justices, and as these can easily consult copies of them (which are in the hands of the clerks of the peace) it is sufficient to refer to them (*a*).

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## MARRIAGE.

THE concern which justices of the peace have with marriage consists of two parts :—1. They have some charge of the execution of the laws against irregular marriage. 2. It is necessary that they know, to a certain extent, the rights and obligations of husband and wife, consequent upon marriage, in so far as those affect third parties.

### 1. IRREGULAR MARRIAGE.

By the custom of this country, marriage may be validly constituted not only without any assistance of religion or the church, but without the use even of any precise civil form, if the parties explicitly, fully, and deliberately contract, although they be under age, and have not the consent of guardians or parents. But, at the same time, our practice considers all marriages contracted in this private and unceremonious manner as clandestine and irregular, although not punishable. And where marriage is celebrated in a religious form, certain particulars are appointed by statute to be observed, under the sanction of punishment against the parties, the celebrator, and the witnesses.

There are two defects in the celebration of marriage, either of which subjects those concerned to the statutory penalties.

One of those defects is the celebration being made by a person who is not a clergyman duly authorised by the church ; that is, who is not regularly called to the pastoral functions within Scotland : being, for example, a Jesuit or Popish priest ; or a deposed minister of the Established Church ; or the pastor of an Episcopal meeting, whose orders are not from an English or Irish bishop, or who has omitted to produce and record his orders, or to take the oaths to Government, in manner required by the acts 10 Anne, c. 7, and 19 Geo. II. c. 34 (*b*).

(*a*) 42 Geo. III. c. 73.—59 Geo. III. c. 66.—60 Geo. III. c. 5.—6 Geo. IV. c. 63.

(*b*) 1661, c. 34.—Hume, i. 460.

(See *Nonconformists*, sect. *Episcopals*.) This holds more strongly of one who is a mere lay impostor or intruder into the character of priest or pastor.

Sometimes a couple go into the presence of a justice of the peace or other magistrate, and there exchange the matrimonial consent; and in this there seems to be nothing unlawful on the part of the magistrate, who does not pretend to celebrate the ceremony of marriage, but serves only as a reputable witness of the civil contract. But, if he pray on the occasion, or pronounce the nuptial benediction, and officiate as a clergyman, and especially if he make a common trade of that sort of interference, and take a fee for his trouble, he is liable in the statutory pains (*a*).

The penalty on the celebrator is banishment from Scotland, under the pain of death (*b*); and he may be summarily seized and imprisoned by any ordinary magistrate or justice of the peace for trial (*c*). (See *Arrest*, &c.) The trial can only take place before the Court of Justiciary if the celebrator is to suffer banishment or corporal pains (*d*).

The parties are liable to imprisonment for three months; and, in addition, each nobleman in L.1000 Scots; each baron and landed gentleman, 1000 merks; each gentleman and burgess, L.500; each other person, 100 merks; and they are to remain in prison till they pay the penalties. These penalties are to be applied to pious uses within the parishes where the parties dwell. In case of inability to pay the fine, the parties are to be punished with "stocks and irons." (See *Punishment*, sect. *Pillory*.) The parties are liable in double the fines above specified, if they refuse to reveal the names of the celebrator and the witnesses; to be applied in the same manner; and are to be imprisoned till they reveal them, and till they pay the penalties (*e*). These penalties, in case of refusal, seem to supersede the former (*f*).

The witnesses are liable in a fine of L.100 Scots each; to be applied in the same manner as the penalties before mentioned (*g*).

The other defect in the celebration of marriage is, when it is celebrated without proclamation of banns; and this holds whatsoever be the quality of the person officiating (*h*).

Proclamation of banns is the giving of notice, with an audible voice, in the parish church of the residence of the parties

(*a*) Hume, i. 461.

(*c*) 1698, c. 6.

(*f*) Hume, i. 460.

(*h*) 1661, c. 34.—Hume, i. 461.

(*b*) 1661, c. 34, ratified by 1698, c. 6.

(*d*) Hume, ii. 57.

(*e*) 1698, c. 6.

(*g*) 1698, c. 6.

contracting, on three different Sundays, immediately before divine service, of their names and designations, that those who know of any sufficient objection to the proposed marriage, may offer it before it be too late (*a*). If the parties be of the Episcopal persuasion, the proclamation must be made, both in the parish church and in the Episcopal meeting-house; but, if the minister of the parish church neglect the proclamation, it is sufficient that it be made in the Episcopal meeting-house alone (*b*).

The penalties upon the celebrator, the parties, and the witnesses, are the same as in the case of celebration by a person not duly authorized as a clergyman; with this variation in the case of the parties, that they are not made liable to imprisonment in addition to the fines, and that the fines for the parties are, for a nobleman, L.1000 Scots; for a landed gentleman, 1000 merks; for a burgess, L.500 Scots; for every other "substantious" person, 500 merks; for a yeoman, L.100 Scots; for each person of inferior quality, 100 merks; half to the King, half to the parish or parishes where the married persons resided (*c*). The punishment of parties with "stocks or irons," as before mentioned, in case of inability to pay the fines, and the higher fines before mentioned, upon parties refusing to reveal the celebrator and the witnesses, are the same as in the case of celebration by a person not duly authorized as a clergyman.

The prosecutor proving the celebration, and that no certificate of banns was produced, has proved his case, and lays upon the accused the burden of proving that proclamation was duly made. If a false certificate of proclamation have been produced, this will ordinarily be a sufficient excuse to the minister; but if he be privy to this wrong, he is not only punishable for the irregular celebration, but, according to the extent to which he has gone, may be considered as art and part of the falsehood and abuse of trust by the session-clerk, for which that person is punishable (*d*). It hardly appears that the celebrator will be exculpated by the mere false affirmation of the parties, without production of a certificate, unless he can prove that he was truly over-reached (*e*).

The pecuniary penalties before-mentioned, for both of the statutory irregularities, are to be recovered before the "civil

(*a*) Erskine, i. 6. 10.

(*b*) 10 Anne, c. 7, sect. 4.—*Note.* Justices of the peace cannot ordain a minister and kirk-session to proclaim banns; Hairgrieve and Donaldson against Minister of Linton, &c. 13th July 1749; Kirk Jurisdiction.

(*c*) 1661, c. 34.—1698, c. 6.

(*d*) Hume, i. 462-3.

(*e*) Ibid. 463.

“judge” (*a*). It seems very questionable whether justices of the peace be competent, the matter not having been expressly put under their jurisdiction either by those statutes or by the general statute with regard to their jurisdiction (*b*), or any other statute; and it seems better that such cases should be disposed of by the sheriff.

Those penalties may be sued for before the civil judge, by the public prosecutor, or by the procurator for the church (*c*). The kirk-session cannot prosecute for them (*d*).

Those which have been described seem to be the only modes of this offence which are the objects of the statutory pains. At common law, some of the higher abuses in this quarter are punishable, if they be conducted in such a manner as to bring them under any of the other and larger denominations of crime; *e. g.* to assume a fictitious name, and the character of clergyman, and under these to marry and give certificates of marriage, or even, without the assumption of a false name, to be in the public and common practice of performing the part, and assuming the personage of clergyman, which neither really nor by pretension belongs to the celebrator (*e*).

It may be noticed that, in certain parts of the country, sometimes parties are fined by justices of the peace, and magistrates of burghs, in a small elusory sum, for an irregular celebration of marriage, in order to avoid the imposition of the true penalties, and that sometimes upon a false admission of an irregular celebration, where there has been no celebration, in order to make it appear that there had been a celebration. But such a practice is improper, and is now seldom followed.

## II. CONSEQUENCES OF MARRIAGE.

The consequences of marriage are to be considered as far as regards the patrimonial interests of third parties. Those consequences follow equally whether the marriage have been entered into with religious solemnity, or have been a mere civil contract, either expressly entered into, or inferred from the parties living together as husband and wife.

### 1. *Powers and Rights of Husband.*

(1.) *Communion of goods, and jus mariti.*—All moveable subjects belonging to the husband, or to the wife, which are of a temporary nature, and produce no yearly profits while

(*a*) 1661, c. 34.

(*b*) 1661, c. 38.

(*c*) 1661, c. 34.

(*d*) Kirk-Session of Dundee against Hackney, 14th November 1761; Dict. iii. 123.

(*e*) Hume, i. 463.

they last, even bills, for example, though bearing interest, also the fruits produced from heritable subjects, as the rents of lands, and the interest of bonds, become common to both on the marriage; but the husband has the sole disposal of them. He can by himself receive all the sums due to the wife which fall under the communion, and grant discharges to the debtors; and his creditors may attach them for payment during the marriage (*a*). This is called the husband's *jus mariti*. Upon the dissolution of the marriage, by the death of either the husband or the wife, his *jus mariti* resolves into a right to a share of the goods in communion; a third where there are children, and a half where there are none; the wife having the same share. Any moveable subject, which, after the wife's death, shall be discovered to have belonged to her during the marriage, falls under the communion of goods, to the effect that the husband may draw his share, even though the term of payment was not till after the dissolution of the marriage (*b*). But a conditional debt, the condition of which does not exist till after the wife's death, does not fall under communion (*c*). The husband has, in like manner, right to a share of a debt assigned to the wife during the marriage, though not intimated till its dissolution (*d*). It has been found in two cases, that the *jus mariti* extends to debts to which the wife succeeds during marriage, though not vested in her by confirmation (*e*). But the former was attended with peculiar circumstances which influenced the decision; and in the latter, the funds, which were in England, were vested without confirmation. Moveable property acquired by the wife, even after separation from her husband, whether voluntary or judicial, falls under the *jus mariti*.

The *jus mariti* is of course excluded as to any subject, by the conveyance of it to the wife, containing such an exclusion. It is excluded without special provision, in whatever is given for the wife's alimony (*f*). It is also excluded by the disposition of law, in the case of *paraphernal* goods; by which are understood, not only the wife's body clothes and wearing apparel, but all the ornaments of dress proper to a woman's per-

(*a*) Erskine, i. 6. 13.  
1627; Durie.

(*b*) Nicolson against Lyle, 15th June

(*c*) Fotheringham of Powrie against Earl of Hume, 18th November 1694; Fountainhall.—Bankton, i. 5. 87.

(*d*) Scott against Dickson, 29th January 1663.

(*e*) Lady Pultney against Stuart, 18th December 1807.—Egerton against Forbes, 27th November 1812. And see Craigie against Gairdner, 12th June 1817.

(*f*) Erskine, i. 6. 14.

son; as necklace, ear-rings, breast or arm jewels, given by her husband to her at any time of her life, either before or during the marriage (*a*). Things of promiscuous use to husband and wife, as watch, jewels, plate, and even the repositories for holding *paraphernalia*, are not paraphernal, unless they be made such by the bridegroom's giving them to the bride before or on the marriage day (*b*). Things of this last sort are paraphernal only with regard to the husband who made them such, unless the next husband also make them paraphernal (*c*).

The husband enjoys his *jus mariti* without any form of law (*d*).

(2.) *Curatory*.—The husband is curator to the wife. In consequence of which, no civil suit can proceed against her till he be cited as defender for his interest. If he have not his domicile within the territory of the inferior judge before whom the action is brought, application must be made by the pursuer to the Court of Session for letters of supplement for citing him. If a suit be brought before an inferior judge against an unmarried woman, who marries during the dependence, and whose husband is subject to that judge's jurisdiction *ratione domicilii* (see *Forum*) he may be made a party to it by letters of diligence proceeding on the warrant of that judge. But if he be not within the jurisdiction, letters of supplement from the Court of Session are necessary. Another consequence of the curatory is, that the wife cannot sue in any civil action, without the concurrence of her husband. If the husband, without reason, refuse to concur, or be incapable of concurring, on account of any disability, either legal, as forfeiture, natural, as fatuity, or accidental, as residence abroad, or if the suit be against him, the judge will authorize any person whom she recommends to concur with her, and carry on the action in her name, who is called *curator ad litem* (*e*). The husband cannot raise action in the wife's own concerns without her consent.

Another consequence of the husband's curatory is, that all deeds done or granted by the wife, without his consent, are null, though they should relate to her own property, and should make no encroachment on any right competent to him. This extends even to a bride; she cannot, after proclamation of banns is begun, contract debts, or do deeds, gratuitous or onerous, to her husband's prejudice, or her own. The pro-

(*a*) Erskine, i. 6. 15.

(*c*) Ibid.

(*d*) Ibid. 14.

(*b*) Ibid.

(*e*) Ibid. 21.

clamation, in order to have this effect, must be made in the church of the parish of her residence as well as in that of the bridegroom's. But the private knowledge of the person dealing with the bride, that proclamation had been made in the bridegroom's parish church, will be effectual against him (a).

See sect. *Wife's own Property*.

## 2. *Obligations to third parties by wife.*

(1.) *Debts before marriage.*—The husband is liable in payment of the moveable debts contracted by his wife before marriage, though they should exceed what she brought; but the wife is still the proper debtor, and must be cited as such; the husband is called merely for his interest. The husband's liability falls by the dissolution of the marriage. After that time, such debts can be made effectual only against the wife's representatives, or by diligence against her separate estate (b). But this obligation is perpetuated against the husband, if complete diligence, as arrestment, followed by decree of forthcoming, have been used against his estate, upon his wife's debt, whilst she was alive. He must, in such cases, either abandon his property so affected, or relieve it by paying the debt. Though decree have been recovered against the husband for the debt during the marriage, yet, if his estate have not been attached, the obligation upon him falls upon the wife's death, though diligence by imprisonment have been used against his person (c). If the wife's creditors have not been able to obtain payment after her death, from her share of the society goods, or from her separate estate, the husband is liable to them, though they had used no diligence against him, to the extent which the tocher or portion received with her exceeds what was ordinary and suitable, considering the rank and fortune of the parties (d).

The husband is liable for such debts only, due by the wife, as would have fallen under communion had they been debts due to her; for instance, only for the *interest* on bonds of borrowed money; under the exceptions, that he is liable for all her debts where he has been, by the marriage contract, assigned to her *universum jus*, heritable as well as moveable, and that he is liable, after discussing her representatives, to the extent to which her tocher is greater than ordinary, according to the situation of the parties (e).

The person of the wife, while the marriage subsists, is free

(a) Erskine, l. 6. 22.

(b) Ibid. 16.

(c) Ibid. 17.

(d) Ibid.

(e) Ibid. 18.



from execution upon debts contracted by herself; but the husband becomes liable to personal diligence by her creditors in her stead (*a*). A justice of the peace has been subjected in damages for imprisoning a wife for a civil debt (*b*). Execution, however, may be used against her person to compel her to perform acts which are in her power, and which she alone can validly perform, as to exhibit writings in her own custody, upon letters of diligence (*c*). See *Imprisonment*.

(2.) *Personal obligations during marriage*.—All personal obligations granted by the wife during marriage, though with the husband's consent, are *ipso jure* void; as bonds, bills, promissory notes, obligatory receipts, contracts, &c. for whatever cause they may have been granted, whether for borrowed money, for the price of goods, or as cautioner for others; and such obligations do not acquire force even by the wife's judicial ratification of them. But there are exceptions. Where the wife gets a separate *peculium*, or stock, either from her father or from a stranger, for the maintenance of herself and her children, which is, by the grant, exempted from the *jus mariti*, she can lawfully charge or burden that stock, and bind herself for sums of money in relation to it (*d*). Where there is a legal, or even a voluntary, separation of husband and wife, and he has settled a yearly sum upon her for her separate maintenance, her personal obligations, come under during their separation, are effectual against her; yet not so as diligence may proceed against her person. Such obligations granted by her after separation cannot affect him, if he have settled a sufficient allowance upon her (*e*). A wife may bind herself, and not her husband, where they are not judicially or voluntarily, but *de facto*, separated; as, where he goes abroad, and she carries on some trade at home to support herself (*f*).

(3.) *Wife's crime*.—Obligations formed by the wife's crime, or delict, as fines or damages, stand good against herself; but they have no operation against the husband, unless he be convicted of accession to the crime or delict. The effect of such obligations is, in several respects, limited even as to the wife; for though she may be banished, imprisoned, or even punished capitally, on a criminal trial, yet, if the punishment resolve into a fine, or if damages be awarded against her, her person cannot

(*a*) Erskine, l. 6. 19.

(*b*) Pitcairn against Deans and Preston, 18th Feb. 1715; Dict. ii. 341.

(*c*) Erskine, l. 6. 19.

(*d*) Erskine's smaller work, l. 6. 15.

(*e*) Erskine, l. 6. 25.

(*f*) Churnside against Currie, 11th July 1789.

be attached for such fine or damages during the marriage, nor can the goods in communion; diligence must be suspended till the dissolution of the marriage; except as to such separate property belonging to her as does not fall under the *jus mariti* (a). The husband is responsible for the conduct of the cause in such cases in so far as it is malicious, vexatious, and calumnious, and his personal liability for the expences is limited accordingly (b). It has been thought that the goods in communion may be attached for a fine inflicted on the wife, or damages awarded against her, before marriage.

(4.) *Wife's own property*.—A wife's obligations with regard to heritable property belonging to her (as to which, however, justices of the peace have no jurisdiction) are effectual, if the husband, as her curator, have consented. The same law applies to *paraphernalia*, which are the wife's exclusive property. If the wife impledge such, without the husband's consent, in security of a debt contracted by herself, they continue her free property, and are not affected by the pledge. She may impledge such, without the husband's consent, for a debt contracted by him, as his consent is presumed in such a case (c). See sect. Curatory.

A wife's power in making grants, not to take effect till her death, are more ample, as the husband's interest ceases before they have operation. Thus, she may, without her husband's consent, bequeath her share of the goods in communion by testament. And she may become bound for a sum of money in the form of a deed *inter vivos*, if it be not to take effect till after her death (d).

(5.) *Praepositura*.—Where the wife is *praeposita negotiis* by the husband, entrusted with the management either of a particular branch of business, or of his whole affairs, all the contracts into which she enters, in the exercise of her *praepositura*, even the debts due for the price of goods, though they should not be constituted by writing, but should arise merely *ex re*, from furnishings made to her, are effectual; but not against her, only against her husband. A wife *praeposita* over a shop cannot borrow money so as to bind the husband (e). A *praepositura* may be constituted either expressly, by a written commission or factory, or tacitly, where the wife has been in

(a) Erskine, i. 6. 24.—Chalmers against Douglas and husband, 19th February 1790.

(b) Chalmers, *supra*, as reversed in the House of Lords (Baillie against Chalmers) 6th April 1791; Fac. Coll. Appendix, p. 5.

(c) Erskine, i. 6. 27.

(d) Ibid. 28.

(e) Foster against Ferguson, 20th January 1737; Elchies, Husband and Wife, No. 7.

use for a tract of time, without a formal mandate, to act for her husband, while he either approves of her management by fulfilling her deeds, or at least, being in the knowledge of it, connives at it, or acquiesces in it. With regard to disbursements necessary for a family; the wife is presumed, while she remains in family with her husband, to have a *praepositura* with regard to them. In this character, she has power to order whatever articles are proper for the family, and the husband is liable for the price, even though what was purchased may have been applied to other uses, or though he may have given the wife a sum of money sufficient for the family expences (*a*). Loans of money are in a different situation from furnishings; the lender must show not only that the money was necessary, but that it was actually applied for family purposes (*b*). The *praepositura* ceases by the wife's abandoning the family, and taking up her residence elsewhere. The husband is then liable only for the expence of her necessary subsistence, as far as he has not provided her. It ceases also by the husband's depriving her of the charge, by obtaining *inhibition* against her from the Court of Session; after which he is liable only for debts contracted by her for such furnishings, suitable to her station, as he cannot prove that he provided for her otherwise (*c*).

### 3. *Donations Revocable.*

Deeds by the wife to the husband, or by him to her, during marriage, importing a donation, are indeed valid, but may be revoked by the granter at any time during life. A deed which is truly a donation by one spouse to another is revocable, though granted nominally, or in trust, to a third party. But an obligation truly gratuitous, by one spouse to another, is irrevocable, if it contain a right, even gratuitous, in favour of a third party (*d*). Mutual remuneratory grants, made in consideration of each other, are not revocable, if they bear a reasonable proportion to each other. Grants given in consequence of a natural obligation are not revocable (*e*).

Those donations may be revoked either expressly, by an explicit declaration of the donor's will to revoke, which ought to be in writing, if the grant was in writing, or tacitly, by any deed of the donor inconsistent with the gift, as making over to another absolutely the subject gifted (*f*).

(*a*) Erskine, i. 6. 26.

(*b*) This has been found in several cases, but none of them reported.

(*c*) Erskine, i. 6. 26.

(*d*) Ibid. 29.

(*e*) Ibid. 30.

(*f*) Ibid. 31.

#### 4. *Judicial ratification by wife.*

A deed extorted from any person by force or fear, is, of course, reducible upon that ground in the Supreme Court. This is, in particular, the case where a husband has extorted, from his wife, either a principal deed of any kind, or a consent to his disposing of lands settled upon her in life, or the like. And reductions by wives upon this ground were, at one time, often pursued vexatiously. To secure the grantees against the consequences of such actions vexatiously pursued, ratifications have been introduced into our practice, by which the wife, appearing before a judge, ratifies the deed, and declares that she was not compelled or seduced to concur in it, but that she did so of her own free will and motive, and gives her oath that she will never challenge the deed. A deed may be ratified before any judge, very often a justice of the peace, even before one within whose jurisdiction neither the wife nor her husband, nor the grantee, reside. It is not necessary that the wife make oath *in court*. If the husband be present at the ceremony, the deed is presumed to have been ratified under his influence. Nay, if the ratification do not expressly mention that he was not present, it is null. There appears to have been at one time a practice of taking the wife's solemn declaration merely, in place of her oath; but the sufficiency of this is very doubtful (*a*). An instrument in the hands of a notary is taken upon the ratification in the form of a judicial act (*b*).

Judicial ratifications by a wife may be taken by a judge beyond the bounds of his jurisdiction (see *Justices*, sect. Particulars not in Commission).

#### 5. *Effects of dissolution of marriage.*

If the marriage be dissolved by death within year and day after its contraction, all grants made in consideration of it become void, and things return to the same situation in which they stood before the marriage (*c*). The right which the husband acquires, by the marriage, in the wife's moveable goods, comes to an end *retro*, as if it had never been acquired (*d*). If a living child have been procreated of the marriage, which was heard to cry, though it died immediately after, the marriage is as effectual as if it had subsisted for year and day (*e*). It is commonly provided in marriage contracts, that the marriage shall be effectual, though dissolved within

(*a*) Erskine, l. 6. 33.

(*c*) Ibid. 38.

(*b*) Ibid. 34.

(*d*) Ibid. 39.

(*e*) Ibid. 40.

year and day, without the birth of a living child. For the division of the goods in communion, upon the death of the husband or the wife, see sect. Communion of Goods.

When the husband and wife are divorced, they have, of course, no more concern with each other, or effect upon each other's obligations, than strangers.

For the degrees within which marriage is prohibited, see *Incest*.

For a wife's admissibility as a witness, see *Proof*.

### MEDITATIO FUGÆ WARRANT.

THIS is a subject deserving great attention, as it is one of the most delicate parts of the duty of justices of the peace. On the one hand, a justice who proceeds *mala fide* or irregularly in granting such a warrant may be subjected in damages to the debtor, the creditor being also liable in such a case; and being also liable in circumstances which may not subject the judge, *e. g.* where he swears falsely to a debt, or to such facts as may constrain a judge, with no opportunity of seeing them refuted, to issue a warrant; but where a justice judges fairly, and to the best of his powers judicially applied to the circumstances proved before him, he will not be liable in damages, any more than in ordinary cases where he is called upon to judge of evidence. On the other hand, if a justice obstinately refuse a warrant where the *meditatio fugæ* is sworn to, and justified by manifest proof of an intention to escape, and if the debtor escape, the justice may be subjected in damages; but if he form his judgment to the best of his ability, he will not be liable (*a*).

To describe it generally; it is a procedure by which a debtor, who intends to leave Scotland to the disappointment of his creditor, may, on the creditor's application, be committed till he find caution to answer personally in the courts of Scotland, in any action to be brought for the debt, within six months from the date of the warrant of commitment. There have been instances of its being used in criminal cases, but that is improper. See *Arrest.—Bail*.

#### I. WHEN COMPETENT.

This warrant may be obtained if there be merely a claim

(*a*) See Bell's Com. 4th edit. ii. 548.

of debt, though not at the time established by document or decree (*a*).

It may be obtained even upon a debt contracted abroad to a foreign creditor, where the debtor, who is alleged to be in *meditatione fugæ*, has fled from abroad to avoid diligence (*b*), or where he has established a domicile in this country (*c*). If the debtor in such an obligation be for a time, and without fraud, in this country, for a particular and temporary purpose, as a journey of health, of pleasure, or of business, his proper domicile being in his own country, where he is ready to answer, it appears that such a warrant ought not to be issued against him (*d*). It may of course be obtained against a stranger who contracts debt in this country, although he have not established a domicile here.

It may be obtained though the debtor have a personal protection against diligence, if he be taking steps to leave Scotland (*e*). It is not competent against one who is by privilege exempted from imprisonment for debt (*f*). (See *Imprisonment*). It is not competent where the creditor has a caption ready for attaching the person of the debtor, as he has already the full diligence of the law.

It may be obtained though the debtor have sufficient property in this country to answer the debt. The creditor is entitled to have it in his power to use diligence against the person (*g*).

With regard to the *fuga* or flight, the meditation or intention of which is meant to be obviated, and is therefore requisite; the debtor must intend to leave Scotland. It is not enough that he intends to leave one part of Scotland for another (*h*), even for the sanctuary of Holyroodhouse (*i*). He must have a present intention of flight (*j*).

It is not held necessary that the removal be for the purpose of defrauding. It is sufficient, whatever be its cause, that it will have the effect to deprive the creditor of personal execu-

(*a*), Wright against Gammell, 6th February 1782.

(*b*) Erskine, i. 2. 21.—Ray against Bellamy, 21st June 1763.—Tasker against Mercer, 4th March 1801.—Jouet and Attorney against Wooley and Maidment, Nov. 1796, in Hutchison, i. 448.—Bell's Com, 4th edit. ii. 546.

(*c*) Scudamore against Lechmore, 3d June 1797.—Bell, ib. 546.

(*d*) Scott against Carmichael, 6th December 1775.—Bell's Com. 4th edit. ii. 546.

(*e*) Bell's Com. 4th edit. ii. 547.

(*f*) Ibid.

(*g*) Heron against Dickson, 16th December 1773.

(*h*) Laing against Watson and Mollison, 20th December 1789.

(*i*) Place against Donnison and Attorney, 2d July 1814.

(*j*) Place, *supra*.

tion (*a*); but it seems to be necessary to state that it will have that effect. For instance, this warrant has been found competent against a person who meant, without any apparent fraud, to go to America, in order to prosecute his business of a factor (*b*).

There has been a difference of opinion, whether an officer of the army, going abroad by the command of his superiors, in the discharge of his duty, *e. g.* to join his regiment, be *in fuga*. In one case, the Court held that he was *in fuga* (*c*). But in two other cases, one of them the latest on the subject, they held that he was not (*d*); and opinions approving of the judgments in those two cases have subsequently been expressed from the Bench. The same principle, of course, applies to an officer of the royal navy going out of Scotland upon duty; and to a soldier, or a seaman of the royal navy (whose debt amounts to L.20 or upwards, so as to authorize imprisonment. See *Soldiers.—Seamen*) when going out of Scotland upon duty.

An English bankrupt, against whom a commission of bankruptcy has been issued, but who has not obtained the Lord Chancellor's certificate, may be imprisoned in this country as *in fuga*, upon his preparing to return to England (*e*).

Where the absence from Scotland is only to be temporary and short, and is not attended with suspicious circumstances, it does not appear that the debtor can be considered as *in fuga*. Thus, in a case with regard to the master of a coasting vessel which sailed regularly between the west of Scotland and Ireland, the Court, upon report of the Lord Ordinary on the Bills, was of opinion that he could not be held to be *in fuga* when setting out upon one of his periodical voyages, unless there were ground to believe that he intended not to return as usual; and they compared his case to that of the guard of a mail-coach, who may have occasion to cross the Tweed (*f*).

(*a*) Bell's Com. 4th edit. ii. 544.

(*b*) Wright against Gammell, 6th February 1782. The words of the application in this case were, "that the petitioner is credibly informed, and has just ground to believe, that the said George Wright does not mean to remain in Scotland, but intends soon to withdraw himself from Scotland, whereby the effect of the aforesaid process against him, &c. will be utterly disappointed," &c. The creditor did not allege a purpose to evade payment. This was specially objected to; but the objection was not sustained.

(*c*) Campbell against Montgomery, 1790, Bell's Com. 4th edit. ii. 545.

(*d*) Scott against Sandilands, 7th December 1744; Falc.—Bryson, 10th March 1812.

(*e*) Dickie against Dick and others, 20th Dec. 1811.

(*f*) Suspension and Liberation, Shearer, 10th July 1813, Second Division, not reported.

## II. PROCEDURE.

The creditor who believes that his debtor intends to leave Scotland by a *fuga*, such as already described, makes application to a justice of the peace, or other judge or magistrate (*a*) having jurisdiction in the territory within which the debtor is at the time; and, in presence of that judge, swears to the verity of his debt, and to his belief of the debtor's present intention of such *fuga*; and must specify, at the same time, in his deposition, the reasons or facts upon which his belief is grounded (*b*).

Sometimes the creditor makes oath (or affidavit, as it is usually called, when made in England or Ireland) before the judge of a jurisdiction different from that in which his debtor is, for instance, that from which he has fled, and gets a mandatary or attorney to present this oath for him, with a proper application, to a judge of the jurisdiction in which the debtor is. It is common, especially where the original affidavit has been made in England or Ireland, that the mandatary makes oath before the judge to whom he applies, particularly as to his belief of the debtor's intention to leave Scotland. And, in a late case, the Court seemed to consider this as indispensable; at least where, from the interval between the oath and the application, or otherwise, there is a chance of an alteration in the debtor's circumstances or intentions having taken place (*c*).

In several of the cases in which the debtor had fled from England, the creditor there swore that the debtor had left England in order to evade payment of his debt, and that he believed he would also leave Scotland for the same purpose, when he should hear that the creditor intended to proceed against him; and the oath, so qualified, has in several cases either been received without objection (*d*), or the objection has been repelled (*e*).

It has been found to supersede the necessity of taking the creditor's oath, that the debtor acknowledged his purpose to leave the country (*f*); or that evidence was produced before the magistrate, of his being a stranger, a swindler, and a

(*a*) Barrowfield against Witherspoon, June 1797, Dict. l. 571.

(*b*) Laing against Watson and Mollison, 20th December 1789.—Scudamore against Lechmere, 3d June 1797.—Robertson against Chisholm and others, 20th June 1812.—Place against Donnison and attorney, 2d July 1814.—Bell's Com. 4th edit. ii. 541.

(*c*) Place, *supra*.

(*d*) Scudamore, *supra*.—Tasker, *supra*, &c.

(*e*) Bowes against Reid, 10th February 1816, not reported.

(*f*) Wright against Gammell, 6th February 1782.



cheat (*a*). But those, especially the last, were very particular cases; and it is the safe and proper course in every case to require the oath, particularly as greater strictness is gradually gaining ground as to this warrant.

If the grounds of suspicion of the debtor's intention of *fuga*, mentioned by the creditor, appear to justify the suspicion, the judge immediately grants warrant for bringing the debtor before him for examination. This he does summarily, and without intimation to the debtor.

This warrant for apprehension may be executed upon Sunday (*b*); and, if granted by the bailie of the Abbey, may be executed within the Abbey (*c*).

There is a great diversity of opinions upon the bench of the Court of Session, how far the judge can delegate the examination of the debtor to the clerk of court, or other person not being a magistrate: and this will be a sufficient reason for the judge not delegating that duty (*d*).

If the debtor in his declaration admit circumstances which necessarily infer an intention of *fuga*, such as has been described, there is of course no occasion for farther inquiry. If he do not, the judge must make such a summary inquiry into the allegation of his intentions of *fuga*, as seems proper in the circumstances of the case. It might sometimes defeat the ends of justice, if evidence of the causes of the creditor's belief were required of him: but, at the same time, wherever it may reasonably be believed that such evidence would be in his power, if the causes of suspicion assigned by him were true, it appears that it ought to be required of him. The debtor ought to be examined in reference to any circumstance which may appear suspicious, and ought to be allowed to bring forward evidence to refute the allegations of the creditor, for which purpose he seems to be entitled to a short delay if he require it, he remaining in custody in the meantime (*e*).

If, on considering the whole case, there be no reasonable belief that the debtor intends to leave Scotland by a *fuga*, already described, the judge immediately liberates him. If there be reasonable belief of such intention, the judge grants warrant for committing him till he find caution, in the terms after men-

(*a*) Dean against Magistrates of Ayr, 27th January 1803.

(*b*) Kempt against his Creditors, 16th January 1786.

(*c*) Park against Bennet, 10th February 1787.—Wight against Nibbie, 9th March 1793.

(*d*) Borthwick against M'Gibbon and Hamilton, 14th May 1813.—Carrick against Martin and Company, 14th November 1818.

(*e*) See Bell's Com. 4th edit. ii. 542-3, and Scudamore against Lechmere, 3d June 1797.

tioned. It is not competent to grant this warrant till the judge have examined the debtor (*a*). The effect of the warrant is to authorize the imprisonment of the debtor's person in the common jail, or, if he be within the Abbey, in the Abbey jail (*b*), till he find caution.

The debtor committed for want of caution is entitled to be liberated if no action be raised within six months from the date of the warrant of commitment; but he is not entitled to be liberated sooner (*c*). Where action is raised within the six months, the debtor must remain in custody to abide the issue of it, unless he can find caution under the warrant.

Where the oath of the creditor, the examination of the debtor before commitment, or any other necessary step of procedure, has been omitted, the debtor is entitled to be instantly liberated; even though he have found caution in terms of the warrant of commitment, and have been imprisoned, on the cautioner producing him at the bar (*d*), as afterwards explained.

The debtor, when committed for want of caution, may be allowed any indulgence by the jailor, for instance, enlargement, provided he be produced in judgment when called for (*e*).

### III. CAUTIONER'S OBLIGATION.

The caution which the debtor is required to find is, not that he shall pay the debt (*f*), but only *judicio sisti* (that is, that he shall attend personally at all the diets of court when required) in any action, relative to the claim in the application, depending at the date of the warrant of commitment, or in any action which shall be raised for it before a competent court, within six months from that date, otherwise the cautioner is to be liable for the amount (*g*). Where it seems proper, the obligation taken is only to present the debtor a certain reasonable time after requisition: for example, in one case six months

(*a*) Captain Hamilton, 25th May 1811.—Robertson against Chisholm and others, 20th June 1812.—Anderson against Smith, 26th Nov. 1814.

(*b*) Park against Bennet, 10th February 1787.—Wight against Niblie, 9th March 1793.

(*c*) Gorman against Hedderwick, 3d Feb. 1827.

(*d*) Robertson against Chisholms and others, 30th June 1812.

(*e*) Gordon against Wellis, 24th January 1786.—Brown against Magistrates of Lanark, 16th November 1792.—Bell's Com. 4th edit. ii. 547.

(*f*) Herries against Lidderdales, 7th March 1755.

(*g*) Sometimes the six months are made to run, not from the date of the warrant of commitment, but from the date of the bond of caution. But it rather appears that, where those dates are different, the former ought to be taken, as the principle is to allow six months, and no more, to enable the creditor to bring his action.

notice was allowed where the debtor could shew that his affairs required him to go abroad (*a*).

Under this bond (which, according to practice, the creditor appears to be entitled to have in the terms before mentioned, although perhaps it may be thought that, in principle, the only thing to be prevented is the debtor leaving Scotland, and not the occurrence of circumstances unfavourable to the personal diligence of the creditor which could not have been made the objects of direct application (*b*)) the debtor must be presented personally in court, and as open to diligence as at the time of his apprehension. Thus, it has been found that a cautioner, who had forfeited his bond by not presenting the debtor upon requisition, could not be restored by presenting him after he had obtained a personal protection, although before the debt was constituted (*c*). Thus, also, a cautioner was found to be bound to present the debtor personally in court, although he had retired to the sanctuary of Holyroodhouse (*d*). This rule, however, is not to be taken in a captious sense; but only in a reasonable way, so as to answer the creditor's purpose: for instance, it is sufficient that the cautioner shews where the debtor is lying in jail for another debt, so that the creditor may arrest him, and instructs the truth of this by a certificate under the hand of the jailor.

The obligation of the cautioner expires, 1. By the death of the debtor during the action. 2. By the cautioner giving the creditor due notice of his intention to present the debtor in court, that he may be freed from his engagement, and presenting him accordingly, and protesting for freedom: in which case the debtor may be committed of new till he find caution, if he be still *in meditatione fugæ* (*e*). 3. By the creditor requiring production of the debtor before the decree becomes final, on reasonable notice, and the cautioner producing him, and protesting that he shall be free: in which case also the debtor may be committed for caution. 4. By action being concluded by the decree being extracted without presentment of the debtor being called for (*f*). 5. By expiry of the six months without action being raised.

#### IV. SECURITY AFTER DECREE.

As the caution under the *meditatio fugæ* warrant extends,

(*a*) Wright against Gammell, 6th February 1782.

(*b*) See Bell's Com. 4th edit. l. 293-4.

(*c*) Cowan against Aitchison and Walker, 28th November 1797.

(*d*) Tasker against Mercer, 27th February 1802.

(*e*) Stevenson and others against Chisholm and others, 11th March 1812.

(*f*) Stewart against Fraser, 8th July 1809.

in the first instance, only to appearance in the action, an extension of this warrant has taken place, to secure the creditor in personal execution, where there is reason to believe that the debtor means to leave Scotland whenever decree is extracted, without giving the creditor time to obtain a caption upon it. It proceeds upon a new application to a judge, which, like the original application, must be supported by the creditor's oath of belief of the debtor's intention to leave Scotland before execution, and by a specification of circumstances rendering that probable, and by the examination of the debtor. It may be obtained either before or after decree, and though caution to appear in the action have not been found. If the action be depending, and the debtor appear in court, by requisition to the cautioner or otherwise, the judge before whom it depends will grant the warrant. The caution to be found is, that the debtor shall appear personally at some fixed place of public resort in Scotland, as the sheriff-clerk's office, the justice of peace office, &c. at such a specified time as may enable the creditor to execute personal diligence against him, by giving a charge and obtaining caption (*a*).

This warrant seems to be governed by rules analogous to those which govern the warrant to find caution for appearance in the action. In particular, (under the terms of the cautioner's obligation, which practice has sanctioned, and which is analogous to what holds in the case of caution for appearance in the action, although perhaps it may be doubted whether, in principle, the creditor ought to be entitled to demand more than that the person of his debtor should be secured within Scotland (*b*)), the cautioner must present the debtor as accessible to diligence as when apprehended. And if the debtor be committed for want of caution, and diligence be not used within the reasonable time specified in the warrant, he seems entitled to be liberated.

#### V. FORMS OF PROCEEDINGS.

##### 1. *Petition of Creditor.*

"Unto the Honourable his Majesty's Justices of the Peace  
"for the county of \_\_\_\_\_,"

"The Petition of A B" [design him],

"Humbly sheweth,

"That C D" [design him] "who is at present within the

(*a*) See Cockburn against Inglis, 21st June 1776.

(*b*) See Bell's Com. 4th edit. l. 295.

“jurisdiction of your Honors, is justly addebted, resting, and  
 “owing to the petitioner, the sum of                    pounds  
 “sterling, and interest thereof, being the amount of an ac-  
 “count for furnishings herewith produced, and which is  
 “marked as relative hereto,” [or as the case may be, specify-  
 ing the amount of the debt and how constituted. The peti-  
 tioner ought to produce the document of debt, ground of debt,  
 or account, if it can be done, which ought to be referred to in  
 the petition as produced, and marked by the petitioner and the  
 justice as produced. If it cannot be produced, the debt ought  
 to be specified by a sufficient description as to amount, date,  
 ground of action, &c. If the debt be future or contingent,  
 it ought to be described as such].

“That the petitioner has raised an action before the court  
 “of                   ,” [or “intends to raise an action,”]  
 “against the said C D for payment of that debt.

“That the petitioner has been credibly informed, and be-  
 “lieves in his conscience, that C D is *in meditatione fugæ*,  
 “and intends immediately to leave Scotland in order to de-  
 “fraud the petitioner” [or, if that cannot be alleged, “where-  
 “by the petitioner will be defrauded,” or, if that cannot be  
 alleged, “whereby the petitioner will be disappointed”] “of  
 “payment of the debt before mentioned.

“That the petitioner is ready to depone to the verity of the  
 “debt, and to his belief that C D is *in meditatione fugæ*,  
 “and to sufficient grounds for such belief.

“May it therefore please your Honors to take the deposi-  
 “tion of the petitioner, and to grant warrant to officers  
 “of court to apprehend C D, and bring him before your  
 “Honors for examination, and thereafter to commit him  
 “to the tolbooth of                    therein to be detained  
 “till he find sufficient caution in your Honors’ court  
 “books, *de judicio sisti*, in the before depending action,”  
 [where there is such] “or in any action for payment of  
 “that debt which may be raised against him at the peti-  
 “tioner’s instance, before a competent court, within six  
 “months from the date of the warrant of commitment.

“A B.”

[Where the creditor has obtained decree, the petition states  
 so, and is varied to crave caution for the debtor to present him-  
 self at some place of public resort, at such time as may reason-  
 ably be sufficient to enable the creditor to obtain a caption  
 against him.]

2. *Deposition of creditor.*

[Place and date.] “ In the application at the instance of “ A B,” [design him] “ against C D,” [design him] “ as in “ *meditatione fugae*, in presence of G H, Esquire, one of his “ Majesty’s justices of the peace for the county of

“ Compeared the petitioner, who, being solemnly sworn and “ examined, depones, that what is contained in the petition is “ true ; that the debt there mentioned is justly due by the said “ C D to the petitioner ; and that the petitioner has been cre- “ dibly informed, and believes in his conscience, that C D is in “ *meditatione fugae*, and intends immediately to leave Scot- “ land, in order to defraud the petitioner,” [or “ whereby the “ petitioner will be defrauded,” or “ disappointed”] “ of that “ debt. And depones that his reasons of belief are,” [insert “ shortly the reasons of belief. Any special circumstances at- “ tending the case, *e. g.* the debtor’s being a foreigner, or having “ fled from England to avoid diligence, to be stated]. “ All “ which is truth, as he shall answer to God.”

“ A B.

“ G H, J. P.”

3. *Warrant to apprehend for examination.*

[Place and date]. “ The justice having considered this pe- “ tition, and the productions,” [if there were such] “ and the “ deposition of the petitioner, grants warrant to constables of “ court to apprehend C D, therein designed, and to bring him “ before any of the justices for examination.”

“ G H, J. P.”

4. *Declaration of Debtor.*

[Place and date]. “ In the application at the instance of “ A B against C D, as in *meditatione fugae*, in presence of “ G H, Esquire, one of his Majesty’s justices of the peace for “ the county of

“ Compeared the said C D, who, being examined, declares,” [He is usually first asked whether he admits the debt. But that is not necessary ; and his negative answer is of no consequence, because the petitioner’s oath of verity is sufficient evidence of the debt in this application. He is then interro- gated on all pertinent facts relative to his intention to leave Scotland. And his statement is to be inserted ; comprehend- ing any thing pertinent which he may of his own accord state,

explanatory of his conduct and intentions]. “ All which is  
“ truth.”

“ C D.”

“ G H, J. P.”

5. *Order for Proof.*

[If the debtor do not admit enough with regard to his intentions, to render a proof unnecessary].

[Place and date.] “ The justice having resumed consideration of this petition with the oath of the petitioner, and productions,” [if there were such] “ and the declaration of C D, allows to the petitioner a proof of all facts tending to establish that C D is *in meditatione fugae* from Scotland, and to C D a conjunct probation. Grants diligence to both parties against witnesses; appoints the proof to proceed at this evening at six o'clock” [or other early time specified]. “ And grants warrant to constables of court to detain C D in custody in the meantime, and to produce him at the time and place before specified.”

[The debtor is often allowed to be at liberty in the meantime, by an extrajudicial arrangement between him and the petitioner, usually by a friend granting a letter binding himself to present the defender at the time and place specified.]

6. *Proof.*

[Place and date]. “ Compeared N O,” [design him] “ a witness for the petitioner, who being solemnly sworn, purged of malice and partial counsel, and interrogated for the petitioner, depones, &c. Interrogated for the defender, depones, &c. All which is truth, as the deponent shall answer to God.”

“ N O.”

“ G H, J. P.”

“ Compeared P Q” [design him] “ a witness for the defender, who being solemnly sworn, &c. *ut supra*, and interrogated for the defender, depones, &c. Interrogated for the petitioner, depones, &c. All which is truth as the deponent shall answer to God.”

“ P Q.”

“ G H, J. P.”

7. *Warrant of commitment for caution.*

[Place and date]. "The justice having resumed consideration of this petition and the productions, the deposition of the petitioner, the declaration of C D, and the proof adduced for both parties," [or according to the procedure which has taken place] "grants warrant to constables of Court to apprehend C D, and to commit him to the tolbooth of \_\_\_\_\_, the keepers whereof are hereby ordered to receive him, and to detain him until he find sufficient caution acted in the justice of peace court books, *de judicio sisti*, in the depending action mentioned in the petition," [where there is such] "or in any action for payment of the debt mentioned in the petition, to be brought against him at the petitioner's instance in any competent court, within six months from this date."

"G H, J. P."

[Where decree has been obtained, as noticed under petition, the caution ordered is that C D shall present himself at a specified place of public resort, *e. g.* the office of the clerk of the peace, and at a specified day and hour, as there noticed].

[The commitment to gaol is usually delayed for a few hours, in order to give time for finding caution].

8. *Caution.*

[This is in the same form as bail; a slight alteration only being necessary, on account of the difference of the object].

[NOTE. The different deliverances by the magistrate are usually written in succession on the petition. The deposition of the petitioner, the declaration of the debtor, and the proof, are usually written on separate papers].

See *Border Warrant*.

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MILITIA.

## I. REGULAR MILITIA.

THE ground-work of the enactments with regard to the regular militia is the act 12 George III c. 91, which, however, has undergone considerable alterations.



A great part of the business is conducted by the sub-division meetings of lieutenancy, which generally consist of two deputy lieutenants, or one lieutenant and one justice, and sometimes of two justices. But it is not within the compass of this summary to treat of the duty of the lieutenancy. The subsisting acts must be consulted.

Justices of the peace, as such, have certain duties imposed upon them. They have jurisdiction with regard to wages due to servants inrolled; with regard to substitutes or volunteers not appearing to be sworn in; with regard to money agreed to be given to substitutes or volunteers; with regard to militiamen enlisting without authority into other forces; or sergeants beating up for volunteers without authority. The militia, when called out to annual exercise, are to be billeted by justices and magistrates as regular soldiers. A justice is to assist in providing carriages, horses, &c. for conveying the arms, &c. of the militia when on its march or exercise, as the regulars. He may punish militiamen for not appearing at exercise, or for deserting. He may commit persons appearing to be deserters till they be claimed. He may punish for buying militiamen's arms, &c. Penalties under L. 20, not otherwise directed, may be recovered before justices. The provisions in the mutiny act, as to enlisting, extend to the raising of men by beat of drum for the regular militia.

Militiamen's wives have a certain allowance from the county, the rate of which is fixed by the justices at their Michaelmas quarter sessions. The minister and kirk-session are to grant every three months a certificate of the state of the militiamen's families; on production of which, any justice satisfied with it makes an order for an allowance, which he transmits to the clerk of supply (a).

Those are the outlines of the most prominent subsisting regulations which concern justices. But to enter into any detail would far exceed due limits, and might mislead, as new acts on the subject are passed from time to time. When a case occurs, the subsisting acts must be consulted.

## II. LOCAL MILITIA.

The local militia is at present regulated by the act 52 George III. c. 68, to which some additions have subsequently been made.

In a great variety of things to be done, two deputy lieuten-

(a) 40 Geo. III. c. 9.

ants may act, or one lieutenant and one justice, or sometimes two justices.

Any justice may impose any penalty under L.20, on confession, or oath of one witness, to be levied by distress. If any dispute arise between masters and servants inrolling, about wages under L.20, a justice may settle it. Any two justices and one deputy lieutenant may, in absence of the lord-lieutenant, vice-lieutenant, or sheriff, call out the local militia to suppress riots. A local militiaman falling sick on the march may be relieved, on warrant of a justice, by the kirk-session. Any justice may grant warrants for impressing carriages for local militia on its march. Men selling, pawning, or losing their arms, &c. to be punished by a justice; also persons buying those articles. Justices may commit deserters, pay 20s. to those apprehending them, and punish those harbouring them.

Persons on half-pay, serving in the local militia, may receive pay, on taking a certain oath before a justice (a).

To enter into detail would be prolix, and might mislead, as new acts are passed from time to time. Justices can procure the subsisting acts when necessary.

See *Soldiers*.—*Volunteers*.

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## MINORS.

QUESTIONS on this subject may occur before justices in the exercise of their civil jurisdiction.

All persons under 21 years of age are called *minors*. Males under 14 years, and females under 12, are called *pupils*; males and females between those ages and 21 are called minors *puberes* (marriageable) or sometime simply minors.

Upon the death of the father, who is the natural guardian of minors (see *Children*) other guardians are appointed in his room. Pupils have guardians appointed either by their father or by law, from relationship, or by the King in Exchequer; in the order now mentioned. Minors *puberes* may have guardians appointed for them by their father; and if he do not appoint such, the minors may, if they please, do so for themselves. The guardians of pupils are called *tutors*; those of

(a) 52 Geo. III. c. 3, sect. 7.

minors *puberes* are called *curators*. The Court of Session have, in certain circumstances, appointed a *curator bonis* to minors *puberes* (a).

Tutors and curators cannot exercise their offices till they have made up inventories as required by law (b). But if a debtor pay before that, the payment is effectual (c).

The chief difference between tutory and curatory is, that the tutor is appointed to the *person* (as it is expressed) of the pupil, the curator to the *estate*. The pupil is held in law to be incapable of acting or consenting. He does not subscribe along with the tutor. His person is at the disposal of his tutor or next cognate (d). The minor *pubes* acts; the curator only consents. A deed signed by a curator without the minor, or by a minor having a curator, without the curator, is void. The person of the minor is not at the disposal of the curator: he chooses his own residence.

A tutor for and in name of the pupil, and a curator with the minor *pubes*, can sue for, receive, and discharge, all sums due to the minor, even principal sums, if the minor's necessities demand it; and may use diligence against the minor's debtors (e). He can sell the minor's moveables (f). He can transact, or refer to arbiters, all claims of moveable subjects competent to the minor (g). Neither tutors nor curators can authorize any deed of the minor in which they have an interest, or which tends to produce an obligation against him in their own favour; thus, a tutor cannot lend money to the minor (h).

No tutor or curator can assign any subject belonging to the minor for the payment even of a debt due by the minor himself (at least not without necessity); but where a cautioner has paid a debt due to the minor, he is entitled to an assignation of the claim, in order to operate his relief the more easily against the principal debtor (i).

A creditor of the minor must, in his action against the minor, make the tutors or curators parties. It is sufficient to cite them edictally, at the head borough of the jurisdiction where the minor resides, without mentioning their names; and decree will go against the minor and them for their interest; but no execution can pass on it against their persons or estates, unless it was pronounced on the medium that they were possessed of the debtor's money, by which the debt might be paid wholly or in part (j). Where a minor has no

(a) Watson and others, petitioners, 6th February 1827.

(b) 1672, c. 2.

(c) Erskine, i. 7, 23.

(d) Ibid. 14.

(e) Ibid. 16.

(f) Ibid. 17.

(g) Ibid. 18.

(h) Ibid. 19.

(i) Ibid.

(j) Ibid. 24.

tutors or curators, it is necessary that a tutor *ad litem* should be appointed to him in order to render a decree against him effectual (*a*).

The binding effects of any obligation extending beyond the pupillage expire on the child reaching puberty, unless the authority of the Court of Session have been obtained to it (*b*).

Deeds done, or contracts entered into by a pupil, and not by his tutors in his name, or by a minor *pubes*, having curators, without their consent, are not binding against the minor; but the opposite party may be compelled to fulfil the contract, if it be deemed profitable to the minor, who in that case must perform his part of it. Minors, however, are bound for all sums profitably applied to their use. A minor *pubes* may marry without consent of curators. Deeds of a minor having no curators are as effectual as if granted with consent of curators (*c*). A minor engaged in trade is bound by obligations undertaken by him in relation to that trade (*d*); and a bill granted by such is presumed to have been granted in relation to his trade (*e*); but the presumption that money borrowed by him is for the purposes of his trade, may be redargued by proof of the contrary (*f*).

Where a tutor is named *sine quo non*, every act of administration requires, not his presence merely, but his consent (*g*).

Neither tutory nor curatory expire by the renunciation of the tutor or curator. Tutory expires by the death of either the tutor or the pupil, and by the pupil reaching puberty. Curatory expires by death in the same way, by the minor reaching majority, and, in the case of a female minor, by her marriage. Tutory and curatory expire by the supervening incapacity of the tutor or curator; of which the marriage of a female tutor or curator is an instance (and the marriage of a female tutor or curator, named jointly with others, or *sine quo non*, dissolves the whole appointment, unless a stronger intention appear, in the person making the appointment, that the others should still act (*h*)); and they also expire by the tutor or curator being removed by the Court of Session (*i*). Where more than one person are named tutors and curators, the no-

(*a*) Bannatine, petitioner, 14th December 1814.

(*b*) Erskine, i. 7. 16.—Colt against Colt, 6th March 1800.

(*c*) Ibid. 33. (*d*) Galbraith against Leslie, 20th June 1676; Dict. i. 584.—Grieve against Tait, 14th July 1732; Dict. i. 585.

(*e*) Craig against Grant, 5th July 1732; Dict. i. 585.

(*f*) M'Donald against , 16th June 1789; Dict. iv. 5.

(*g*) Mrs Susannah Vere against Earl of Hyndford, 1st June 1791.

(*h*) Scott against Scott, 11th March 1775. (*i*) Erskine, i. 7. 29.

mination stands if any one accept or survive, unless they have been appointed joint, or unless one have been appointed *sine quo non*, and that one decline or die (a).

If the tutor have cleared himself of the tutory, by settling the tutorial accounts at the expiry of it, he is free from any claim at the instance of the pupil's creditors. But if he have not done so, and if the creditors have thrown in a personal conclusion against him, he must shew that he has no funds of the pupil in his hands to answer the demand.

The persons of pupils cannot be imprisoned "for any debt or civil cause" (b). This expression, perhaps, even prevents their being imprisoned upon a decree for fine and damages, as the matter has taken a civil form; but they may still be imprisoned directly for punishment. See *Crimes*.

When, as sometimes happens, there is not room for any of the kinds of regular tutory, the Court of Session are in the use of appointing a *factor loco tutoris*, who takes charge of the estate, but has not the disposal of the person (c).

Where a minor *pubes* is pursuer or defender in any action, if that action be against his curators, or if he have no curators and it be against a stranger, a *curator ad litem*, to conduct his suit, will be given to him by the judge, even at the desire of the opposite party; for judgment against a minor is of no effect without a curator. If neither party ask the appointment to be made, the judge ought to make it *ex officio*. This sort of curator makes oath faithfully to administer the office, but need not find security. Such curators are still more necessary for pupils who have suits against their tutors (d).

## MISCHIEF, MALICIOUS.

### I. IN GENERAL.

MALICIOUSLY to injure the property of another, whether from malice or from misapprehension of right, is a cognisable crime, though of late the civil courts have usually been resorted to in such cases. It will not exculpate the offender that what he did was in order to recover a subject, the right to which was in controversy between the parties. Interference with law-

(a) Erskine, l. 7. 30.

(b) 1606, c. 41.

(c) Robertson against Elphinstone, 28th May 1814.

(d) Erskine, l. 7. 13.

ful and peaceable possession of another is as culpable as interference with property. Violence and tumult seem essential parts of the offence where the patrimonial damage is small, or has been done from misapprehension of right; but not in cases of a different description, such as poisoning or maiming dogs, sheep, or cattle (*a*). It is made capital, by statute, to injure beasts of draught, or plough gear in seed time, or the former in harvest (*b*). Statutory provision has also been made with regard to mischief to certain species of manufactures, (see *Manufactures*, sect. Breaking into House, &c.)

Justices of the peace seem competent to punish minor instances of malicious mischief, particularly such as savour of a breach of the peace; but, where the act is of a more aggravated nature, their duty is to prepare the case for trial before a higher court. (See *Arrest*, &c.)

For damages done by mobs, See *Damages*, sect. Riot.

For malicious stabbing, administering poison, throwing acids, &c. see *Crime in general*, sect. Wrongful Act necessary.

See *Injuries*, *Real*.

## II. FIRE-RAISING.

The most alarming and destructive kind of malicious mischief is wilful fire-raising.

### 1. *How constituted.*

To constitute the crime of fire-raising, there must have been actual burning; the fire must have made some progress in consuming the subject. But it is sufficient that the fire have been *raised*; though only a small part of the subject have been consumed (*c*). The fire-raising must have been wilful. This is often of difficult proof, and must be judged of by the circumstances of the case (*d*). The guilt is incurred, though the fire was not applied directly to the subject which the accused has destroyed, but to another from which it was likely to communicate to it, although not with the direct intention of its communicating (*e*). It is immaterial whether the burning be the ultimate object of the culprit, or only a mean of farther mischief, as burning the doors of a jail to release the prisoners (*f*).

### 2. *How punished.*

The setting fire to houses, corns, or coalheughs, is capital (*g*).

(*a*) Hume, i. 119-121.

(*b*) 1581, c. 110-1587, c. 83.—Hume, i. 121.

(*d*) Ibid. 125-6.

(*e*) Ibid. 126-7.

(*c*) Hume, i. 123-5.

(*f*) Ibid. 127.

(*g*) Regiam Majestatem, B. iv. c. 6—1426, c. 75—1528, c. 8—1540, c. 118—1567, c. 32—7 Anne, c. 21.—Hume, i. 122.

By houses are here understood any buildings, whether dwelling houses, work-houses or ware-houses, or barns, stables or other out-houses, if they be not mere hovels or temporary places of shelter (*a*). The capital crime is complete if a landlord burn his house to injure his tenant who is in possession; or if the tenant do so to injure the landlord; or if a fiar do so to injure the liferenter who is in possession; or if the liferenter do so to injure the fiar (*b*). It seems not to be settled whether it be a capital crime to burn a man's own house in order to defraud his insurers (*c*). A man may, indeed, if he choose, burn his own house, if no inconvenience follow to others; but if the house be situate in a town, and the owner set fire to it, without any bad intention, so as to create alarm or do damage, he is punishable arbitrarily (*d*). If he set fire to it with the intention of burning the houses of others, and this injury follow, his crime of course is capital. Corn is protected equally whether in the field or in the barn-yard (*e*).

The maliciously setting fire to any wood, underwood, or coppice, is capital (*f*).

Burning ships to defraud insurers, or others, is capital (*g*).

Wilfully burning or setting fire to any mill (*h*), or any building or erection for carrying on trade or manufactures, or for depositing goods (*i*), is capital.

To destroy, by fire, any other property, moveable or immoveable, may be followed by the highest arbitrary punishment (*j*).

The mere attempt, or threat, or solicitation, to commit the crime of fire-raising, is punishable arbitrarily (*k*).

Justices cannot inflict sufficient punishment for this offence, but may prepare it for a higher court. (See *Arrest*, &c.)

## NAUTÆ, CAUPONES, STABULARII.

IN this article is to be noticed the obligation (questions on which may occur before justices under the small debt act) by

(*a*) Hume, l. 128.

(*b*) Ibid. 129.

(*c*) Hume, l. 128.

(*g*) 29 Geo. III. c. 46.

(*i*) 52 Geo. III. c. 130, sect. 1.

(*k*) Ibid. 131-2.

(*e*) Ibid. 130-1.

(*f*) 1 Geo. I. c. 48, sect. 4.

(*h*) 9 Geo. III. c. 29, sect. 2.

(*j*) Hume, l. 131.

(*d*) Ibid. 130.

which those persons, shipmasters, innkeepers, stablemen, and the like, are liable for the loss or injury of goods deposited with them, or horses put up with them, though arising from the act not of themselves or their servants, under the contract of *location*, but of third parties, as by theft, robbery, or otherwise. This obligation is extended to vintners and boroughs, though they be not innkeepers (*a*), to carriers, and to the proprietors of stage-coaches (*b*). It is stated by Mr Erskine to extend also to householders who receive lodgers (*c*); but in a subsequent case this was doubted upon principle, and upon the ground that the case cited by Mr Erskine as his authority was attended with specialties, but the point was not decided (*d*). Not only the masters of ships, but the employers, are liable, each for the interest which he has in the ship (*e*). (See *Damages*, sect. Shipmaster, &c.) It has been doubted, however, whether such questions with shipmasters, (at least where the vessels are ships sailing on the open sea, and not mere canal boats or the like), being of a maritime nature, can be tried otherwise than before the Courts of Admiralty.

It is not necessary that the goods be formally shewn and delivered to the innkeeper, &c. It is sufficient that they be openly put into the inn, &c. and that they be of such bulk as must have fallen under the notice of the innkeeper, &c. or his servants, if they had been properly attentive to their duty. If, however, the parcel be small, and contain money or jewels, it must be particularly described as such, and specially delivered over to the master or his servants; otherwise the owners must suffer the loss, unless they can prove gross negligence on the part of the master or servants. The same seems to hold even of larger parcels, if they contain any thing very precious, such as is not usually contained in such parcels. The owners of stage coaches and other carriages are not answerable for the safe conveyance of parcels peculiarly valuable, such as money, unless particularly described as such when entered (*f*). It has been found, though with a considerable difference of opinion, that an innkeeper is not liable for money contained in a parcel addressed to his care, when the person to whom it is addressed is not a guest in his house, when no notice is given that the parcel is to be sent, and when it is not marked as of

(*a*) Erskine, iii. 1. 28.

(*b*) Bell's Com. 4th edit. i. 376.

(*c*) Erskine, iii. 1. 28.

(*d*) Macdowall against Watling, 10th June 1825; in Shaw's Reports.

(*e*) Erskine, iii. 1. 28.

(*f*) Macausland against Dick, 6th Feb.



particular value (*a*). No goods brought into a ship fall under the edict, unless they have been delivered to the master or mate, or have been entered in the ship's books, or specified in the bills of lading (*b*).

The party is liable in exact diligence (*c*). Thus, a stabler and horse-breaker was found liable for the value of a horse which died of an accident, while under his care, the accident being such as it was thought great caution on his part might have prevented (*d*).

The depositary is not liable if the goods perish *damno fatali*, by an accident which could not be prevented, as where horses are burnt in a stable which accidentally takes fire (*e*).

The extent of the damage may be ascertained by the oath *in litem* of the sufferer. (See *Proof*, sect. Oath *in litem*.) Yet this oath will not be admitted upon his allegation that money was taken from his pockets or trunk, unless, in the circumstances of the case, it shall appear probable (*f*). For instance, if a common labourer should allege that a large sum of money was taken from his pockets in an inn, it seems to be necessary that he should shew either that he was, or that he might reasonably be believed to be, in possession of such a sum.

See *Location*.—*Damages*.

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## NONCONFORMISTS,

### I. IN GENERAL.

VARIOUS statutes against nonconformists, by the Parliament of Scotland, were all repealed at the Revolution, and have not been revived. We have no *test*, as the English have, by which dissenters from the established church are excluded from civil or military employment. There is, however, this reasonable limitation in the act 1707, c. 6, forming part of the treaty of Union, that all persons bearing offices in any university, college, or school, shall subscribe the confession of faith, and adhere to the government and discipline of the presbyterian church (*g*).

The only exception is in the case of Roman Catholics, and

(*a*) Meikle against Skelly, 16th February 1813.

(*b*) Erskine, iii. 1. 29.

(*c*) Ibid. 28.

(*d*) Hay against Wordsworth, 13th February 1801.

(*e*) Macdonell against Ettles, 15th December 1809.

(*f*) Erskine, iii. 1. 29.

(*g*) 1707, c. 6.—Hume, i. 565-8.

also of Episcopalists failing to comply with certain conditions (*a*), as after mentioned.

## II. PAPISTS.

The laws against Roman Catholics were passed chiefly on account of certain of their principles dangerous to our constitution (*b*); but it is believed there is now seldom occasion to apply them.

The following are capital crimes: If a person be reconciled to the Pope or See of Rome; if a person be a second time convicted of defending the Pope's jurisdiction within this realm; if a Popish priest, born within the dominions of the Crown, come over hither from beyond seas, or remain here for three days, without conforming to the church; if a person be a professed Jesuit, or seminary priest, and apprehended within this realm; if a person be a wilful hearer of mass, and conceal its having been said. Accordingly, in 1755, the Court of Justiciary refused bail for saying of mass (*c*). Justices may arrest for those offences. (See *Arrest, &c.*)

If any person reputed a Jesuit, priest, or trafficking priest, or proved to have changed his name, refuse to purge himself of popery, according to a *formula* in the statute cited below, he may be banished from the realm (by the Court of Justiciary (*d*)) under pain of death (*e*). Justices may arrest for this offence.

Roman Catholics taking the oath specified in the act cited below are relieved from the penalties of 8 and 9 William III. c. 3, just mentioned (*f*).

The oath (which is long) can be procured when required.

This oath may be taken at 15 years of age before the sheriff or steward depute or substitute, or before any two justices of the peace for the county or stewartry where the party resides. The person administering the oath must annually, within 30 days after the last day of December, deliver to the sheriff-clerk, or steward clerk, a list of the persons who have, during the year, taken the oath, specifying their quality, condition, title, and place of abode; and must, for one shilling, at any time before the list is delivered, give to the person who has taken the oath, or to any person demanding it, a certificate of the fact (*g*).

The clerks are to make entries of the lists, which may be inspected, and copies required (*h*). Office copies, or extracts

(*a*) Hume, i. 569. (*b*) Ibid. (*c*) Ibid. and authorities there cited. (*d*) 12 Anne, c. 14. (*e*) 8 and 9 William III. (1700) c. 3.—Hume, i. 570. (*f*) 33 Geo. III. c. 44, sect. 1. (*g*) Sect. 4. (*h*) Sect. 5.

of the entries by the clerks, of any person having taken the oath, are evidence of the fact (*a*). Persons who have taken the oath, &c. may enjoy real or personal property in Scotland (*b*). The act does not authorize Roman Catholics to be governors, chaplains, pedagogues, teachers, tutors or curators, chamberlains, or factors to any children of protestant parents, or to be otherwise employed in their education, or in the trust or management of their affairs; or to be schoolmasters, professors, or public teachers (*c*).

### III. EPISCOPALS.

Episcopals (who were at one time disturbed) may meet for divine worship, after their own manner, by pastors ordained as after mentioned, not established ministers, and may use the liturgy of the church of England; and sheriffs, stewards, magistrates of boroughs, and justices of the peace, are required to give protection and assistance to them, in their meetings for worship, held in any place except parish churches (*d*).

The episcopal ministers may administer the sacraments and marry (*e*). Any person disturbing episcopals lawfully assembled for worship, or misusing their minister, upon proof before two justices of the peace, by two witnesses, must find sureties in a recognizance for L.50 sterling, for his appearance at the next quarter-sessions, or before the Court of Justiciary, or other judge competent, otherwise is to be committed to prison; and, upon conviction of the offence, is to forfeit L.100 sterling; half to the informer, half to the poor of the parish where the offence is committed (*f*). For proclamation of banns, see *Marriage*.

Provision is made to secure the purity of the manners of episcopal pastors, and the soundness of their doctrines, ecclesiastical and political. Assemblies for religious worship in episcopal chapels, &c. must be held with doors unfastened (*g*). The pastor must have received orders from a protestant bishop of the church of England or Ireland, and must, before officiating, present his orders to the quarter-sessions, to be recorded, which is done for one shilling (*h*); and must, before officiating, take and subscribe the oaths of allegiance and abjuration, and subscribe the assurance, as all officers civil and military do; and must, at the same time, subscribe the following declara-

(*a*) 33 Geo. III. c. 44, sect. 6.

(*b*) Sect. 7.

(*c*) Sect. 8.

(*d*) Toleration Act, 10 Anne, c. 7, sect. 1.

(*e*) Sect. 5.

(*f*) Sect. 9.

(*g*) 32 Geo. III. c. 63, sect. 2.

(*h*) 10 Anne, c. 7, sect. 2—19 Geo. II. c. 38, sect. 9—21 Geo. II. c. 34, sect. 13.

tion :—" I, *A B*, pastor of a congregation of persons in the " episcopal communion in *Scotland*, meeting for divine worship, at \_\_\_\_\_ in the county of \_\_\_\_\_ do " willingly, and *ex animo*, subscribe to the Book of Articles " of Religion agreed upon by the archbishops and bishops of " both provinces of the realm of *England*, and the whole " clergy thereof, in the convocation holden at *London*, in the " year of our Lord one thousand five hundred and sixty-two ; " and I do acknowledge all and every the articles therein contained, being in number thirty-nine, besides the ratification, " to be agreeable to the word of God" (*a*). He must, before officiating, produce to the clerk of the shire, stewardry, or burgh, where his meeting-house is situated, a certificate of his having so qualified ; which the clerk must enter in a book for the purpose, and of which he must transmit a copy to the clerk of each house of parliament, and must give two attested copies to the pastor for sixpence each ; one to be affixed to the outside of his meeting-house, on or near the door, the other in a conspicuous place in the inside (*b*). A pastor officiating in such chapel, &c. without having qualified, by taking the oaths, and producing certificates, for the first offence forfeits L.20 sterling, half to the informer, half to the poor of the parish ; for a subsequent offence, is to be declared incapable of officiating for three years (*c*). The first offence of this kind seems cognizable summarily before two justices of the peace ; a subsequent offence seems cognizable only before the Court of Justiciary (*d*). The minister must, during divine service, pray for the royal family, as in the liturgy of the church of England ; otherwise, for the first offence, he forfeits L.20, half to the informer, half to the poor of the parish ; and for the second offence, is to be declared incapable of officiating for three years (*e*). This offence seems cognizable in the same manner as that of officiating without due qualification, just noticed (*f*). Any person present twice in one year in any such chapel, where the royal family are not properly prayed for, for the first offence forfeits L.5 sterling, half to the king, half to the informer, and may be imprisoned for six months, unless the forfeiture is sooner paid ; and for any subsequent offence, may be imprisoned for two years from the date of conviction (*g*). The first offence of this kind seems cognizable summarily before two justices of the peace ; the subsequent offences, before

(*a*) 32 Geo. III. c. 63, sect. 2.

(*b*) Sect. 3.

(*c*) Sect. 4.

(*d*) 19 Geo. II. c. 38, sect. 5.

(*e*) 32 Geo. III. c. 63, sect. 5, 6.

(*f*) 19 Geo. II. c. 38, sect. 5.

(*g*) 32 Geo. III. c. 63, sect. 10.

the Court of Justiciary, or circuits (*a*). Any meeting, where five or more persons (besides those of the household, if it be in a house where there is a family inhabiting) hear divine service performed by a pastor of the episcopal communion, is deemed an episcopal meeting-house (*b*). In prosecutions, it is lawful to adduce as witnesses, whether against the minister or hearers, other persons guilty; but their evidence cannot be used against themselves (*c*). Prosecutions must be commenced within twelve months after the offence (*d*).

See *Oaths*.

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## OATHS.

### I. OATHS REQUIRED BY LAW.

These are noticed only as far as justices of the peace seem to be concerned.

Every person admitted into any office, civil or military, in Scotland, must, within three months after admission to the office, take and subscribe the oaths of allegiance (promising fidelity to the reigning family); and abjuration (denying the right of the Pretender, or his descendants, to the throne); and subscribe the assurance (asserting the right of the reigning family to the throne); either in the Courts of Session, Justiciary, or Exchequer, in Scotland, or at the quarter-sessions there for the city or county where such person inhabits, or in any court where the oaths have usually been administered in Scotland, or in the Courts of Chancery, King's Bench, Common Pleas, or Exchequer at Westminster (*e*).

These courts are to keep rolls, in which the subscriptions of

(*a*) 19 Geo. II. c. 38, sect. 8.

(*b*) Sect. 8.

(*c*) 21 Geo. II. c. 34, sect. 22.

(*d*) 19 Geo. II. 38, sect. 10.—32 Geo. III. c. 63, sect. 11.

*Note*.—The penalties, forfeitures, and disabilities in 10 Anne, c. 7; 5 Geo. I. c. 29; 19 Geo. II. c. 38; and 21 Geo. II. c. 34, seem to be superseded by those in 32 Geo. III. c. 63.

(*e*) 6 Anne, c. 14, sect. 1, 2, 3.—8 Anne, c. 15, sect. 1, 2.—The forms of the oaths are long, and are so easily procured, when required, that it is unnecessary to insert them. The form of the oath of allegiance is in 1 Geo. I. c. 13, sect. 3, of the oath of abjuration, and of the assurance, in 6 Geo. III. c. 63, sect. 1. An oath of supremacy (that no foreign prince or prelate has any ecclesiastical authority in this realm) was imposed on all officers, civil and military, by 1 Geo. I. c. 13; but it is not taken in our practice. (Erskine, l. 2. 33.)

all persons taking the oaths are to be made, to which all are to have access without fee (*a*).

Persons required to take the oaths, neglecting, are incapable to enjoy the office (*b*); and if they exercise it by themselves, or by deputy, are liable to the penalties of 13 and 14 William III. c. 6 (*c*) (which, however, cannot be imposed by justices).

Any two justices of the peace, or any other persons appointed by the king in council, or by commission under the great seal, may tender the oaths to any person whom they suspect to be disaffected; and if he refuse to take them, such justices, &c. are to certify the refusal to the next quarter-sessions, to be recorded, and to be from that certified by the clerk of the peace into the Chancery or King's Bench; or Courts of Session, or Justiciary, in Scotland (*d*). Any two justices, &c. may, by writing, summon any person to take the oaths; which summons is to be served on the person, or left at his house of abode with one of the family; and if he do not appear, then, on oath of serving the summons, such justices, &c. are to certify the same to the next quarter-sessions, to be entered on the rolls; and if the person do not appear there, and take the oaths, his name being publicly read at the first meeting of the sessions, he is to be esteemed a popish recusant convict; and this is to be certified by the clerk of the peace into the Chancery, King's Bench, Court of Session, and Court of Justiciary (*e*).

No person is to act as procurator, writer, agent, or solicitor, or to plead or manage business before any inferior court in Scotland, without having first taken and subscribed the oaths, and registered a certificate of it in the court in which he officiates; otherwise, on conviction, in the court where the offence is committed, or before the Court of Session or Justiciary, on a summary trial, he forfeits L.20, half to the king, half to the informer, or suffers imprisonment for six months, unless or until the penalty be paid (*f*).

The proper officer is to have of every person taking the oaths two shillings (*g*); but no fee is to be taken for a seaman or soldier, who is not a commissioned or warrant officer (*h*).

Quakers refusing to take the oaths, may declare the effect of them on solemn affirmation (*i*). (See *Quakers' affirmation*.)

(*a*) 6 Anne, c. 14, sect. 4.

(*b*) Ibid. sect. 5.

(*c*) Ibid. sect. 6.—1 Geo. I. c. 1, sect. 8.

(*d*) 6 Anne, c. 14, sect. 7.—1 Geo. I. c. 13, sect. 10.

(*e*) 1 Geo. I. c. 13, sect. 11.

(*f*) 20 Geo. II. c. 43, sect. 44.

(*g*) 1 Geo. I. c. 13, sect. 9.

(*h*) Ibid. sect. 31.

(*i*) 6 Anne, c. 23, sect. 14.—5 Geo. I. c. 6.

Judges in baron courts must, before officiating, take the oaths appointed to be taken by persons in public trust, and register a certificate of it with the clerk of the shire or burgh where they reside, under a penalty of L.10, half to the king, half to the informer, to be recovered summarily before two justices or other judge competent; and the offenders to be imprisoned six months, unless or until sooner paid (*a*). (With regard to baron courts, see *Preface*.)

There are statutes with regard to offices in England, in the navy, Jersey, &c. (*b*); ministers and licentiates of divinity in Scotland (*c*); universities and schoolmasters in Scotland (*d*); parliament (*e*); lieutenantancy (*f*); a simple reference to which seems sufficient.

## II. OATHS FORBIDDEN BY LAW.

Any person (though not present) concerned in administering or taking any oath or engagement, in whatever form, to engage in any seditious purpose, or to disturb the public peace, or to be of any association formed for such purpose, or to obey any person not having authority by law for that purpose, or not to inform or give evidence, or not to reveal any unlawful combination; act, or engagement, may be transported not exceeding seven years (*g*). Compulsion does not justify, unless within four days after taking the oath or engagement, or after hinderance by actual force or sickness, the person declares the whole of what he knows about it, by whom, in whose presence, and when and where it was taken, by information on oath before one justice of the peace, a secretary of state, or a privy counsellor; if in actual service, either by such information, or by information to his commanding officer (*h*). Offences are to be tried before the Court of Justiciary, or the circuit courts (*i*). Persons tried under this act are not to be tried again at common law for the same offence, but, if not so tried, may be tried at common law (*j*). (See *Treason*.—*Sedition*.)

Any person (though not present) concerned in administering an oath, or an engagement of the nature of an oath, intending to bind any person to commit any felony punishable with death, is to be punished with death; and every person taking

(*a*) 20 Geo. II. c. 43. sect. 23.

(*b*) 1 Geo. I. c. 13.—13 Geo. I. c. 29.—2 Geo. II. c. 31.—9 Geo. II. c. 26.

(*c*) 10 Anna. c. 7, sect. 3.—1 Geo. I. c. 13, sect. 5.—5 Geo. I. c. 29.

(*d*) 1 Geo. I. c. 13, sect. 5.

(*e*) 1 Geo. I. c. 13, sect. 4, 16.

(*f*) 1 Geo. I. c. 20, sect. 13, 14, 15.

(*g*) 37 Geo. III. c. 123,

sect. 1, 3, 4, 5.

(*h*) *Ibid.* sect. 2.

(*i*) *Ibid.* sect. 6.

(*j*) *Ibid.* sect. 7.

such oath, without compulsion, is to be transported for life, or for such term as the court adjudges (*a*). Persons compelled to take such oath are not justified unless they declare, within 14 days after taking it, or after hinderance by force or sickness, that they took such oath, with all that they know concerning it, the persons by whom, in whose presence, and when and where administered, by information, as formerly mentioned (*b*). Persons confessing before being charged, and taking at the same time the oath of allegiance before the justice or magistrate, are indemnified (*c*). The offences to be prosecuted before the Court of Justiciary or the circuits (*d*). Persons tried under this act are not to be tried again at common law for the same offence. If not, they may be tried at common law (*e*).

Justices of the peace cannot try for any of those offences; but they are competent to arrest and precognosce for them. (See *Arrest, &c.*)

For oaths in evidence, see *Proof*.—See *Affidavit*. For profane swearing, see *Profanity*.—See *Nonconformists*.

## PARTIES IN AN ACTION.

### I. CRIMINAL PROSECUTION.

#### 1. *Prosecutor*.

PROSECUTION for punishment of a crime is competent only at the instance of the party injured, or of the public prosecutor (*f*); except in certain inferior offences, where special statutes have extended the right, which are noticed in their places.

To entitle any private person to prosecute for a crime, his interest must be peculiar, arising out of an injury which he, beyond others, has suffered. It is not sufficient that he has some feeble and remote concern in the issue, or one of a general nature, such as arises to him in common with a whole neighbourhood, or with all of the same class of society. Thus, though the keeping of a house of harbourage for thieves is a

(*a*) 52 Geo. III. c. 104, sect. 1, 4, 5, 6.

(*c*) Ibid. sect. 3.

(*f*) Hume, II. 115.

(*d*) Ibid. sect. 7.

(*b*) Ibid. sect. 2.

(*e*) Sect. 8.



nuisance to a whole neighbourhood, none but the public prosecutor, or he who can shew a special damage, not every heritor or inhabitant of the district, can insist for the punishment and removal of the master of such a house (*a*). In like manner, it has been found that a prosecution before justices of the peace by the clerk and treasurer of turnpike trustees for punishment on account of injury done to persons employed by them, though accompanied with obstruction of the execution of their order, was incompetently brought; and could not be validated in their name by the concurrence of the procurator-fiscal (*b*). A trustee for creditors cannot insist for punishment of fraud, forgery, or the like injury to the bankrupt (*c*). In certain statutable offences, however, it is specially provided that any person may sue; and such person is often called a common informer. A private person injured may prosecute for crimes of any kind or degree (*d*).

Though the kinsman or guardians of an injured person may prosecute in certain cases for atrocious offences, which affect themselves as well as the sufferer, it seems very doubtful how far they are entitled to prosecute criminally for wrongs of a lower degree done to him, *e. g.* an assault; though the heir may pursue civilly for the patrimonial damage arising from such wrongs (*e*). With regard to the degree of relationship necessary, a kinsman within the degrees within which marriage is prohibited (see *Incest*) may prosecute; and perhaps the nearest kinsman however remote. Where there are several persons nearly allied, but in different degrees, as widow, brother, uncle, they may prosecute jointly (*f*).

A person outlawed for a crime cannot prosecute even for an injury done to himself (*g*).

A private person cannot prosecute criminally without the concurrence of the public prosecutor, which, however, it appears, that officer may be compelled by the court to give, unless the libel be palpably absurd, incompetent, or illegal (*h*). The public prosecutor may in this way be under the necessity of giving his concurrence to opposite libels; for example, in mutual prosecutions for a brawl (*i*).

The public prosecutor may prosecute for a wrong done to any individual, even though that person should not wish any prosecution to be raised (*j*).

(*a*) Hume, ii. 116-8.

(*b*) Wingate against Brown, 17th February 1809.—Hume, ii. 168.

(*c*) Hume, ii. 116.

(*d*) Ibid. ii. 118, *seq.*

(*e*) Ibid. 120.

(*f*) Ibid. 121.

(*g*) Ibid. 122.

(*h*) Ibid. 122-4.

(*i*) Ibid. 124.

(*j*) Ibid. 130.

He frequently gives not merely his concurrence to a prosecution by a private person, but his instance: by which he becomes as much a party in the case as if the private party did not prosecute; but this does not weaken the private party's instance. Where both give their instance, though either should withdraw his instance, the other may still insist (*a*). Where the public prosecutor has only given his concurrence, on the private party withdrawing his instance, or being found an incompetent prosecutor, the prosecution falls (*b*).

The public prosecutor before justices of the peace, is their procurator-fiscal. It is frequently his duty to prosecute for public offences, which are hardly crimes; as encroachments on highways, &c.

Various statutes enacting pecuniary penalties, and awarding part or the whole to the informer, provide that any person may prosecute. In such a case, the private party prosecuting does not require to qualify any peculiar interest, nor does he require to have the concurrence of the procurator-fiscal. Where part of the penalty goes to the King, the poor of the parish, or the like, the judgment directs the private prosecutor to pay that proportion of it in that way. It seems better, however, that, in such cases, the other party interested, *e. g.* the procurator-fiscal for the King, should concur, on account of their interest in the penalty. Where statutes enacting pecuniary penalties, and giving the whole or part to the informer, do not expressly say who may prosecute, this may perhaps give to any person having a share of the penalty a sufficient interest to prosecute; but it seems more proper that such prosecutions should have the concurrence of the procurator-fiscal for the public interest.

## 2. Defender.

If the defender, in a criminal action, be a *minor*, there is no occasion to call his guardians; or, if a married woman, her husband (*c*).

A criminal action, even though concluding for a fine only, falls when the defender dies, and does not transmit against his representatives, even after *litiscontestatio* (*d*).

For the persons who may be tried by justices, see *Declinature.—Forum*. For the crimes for which they may try, see *Justices of the Peace*.

(*a*) Hume, li. 261.  
(*c*) Hume, li. 157.

(*b*) Wingate against Brown, 17th Feb. 1803.  
(*d*) Gray against Paxton, 18th Feb. 1773.

## II. CIVIL ACTION.

1. *Pursuer.*

Where the pursuer of a civil action is a married woman, she must, in most cases, have the concurrence of her husband. (See *Marriage.*) Where the pursuer is a minor *pubes*, he must have the concurrence of his father, or of his curators, if he have such; and, when a pupil, the action must be brought in his name and that of his father or tutors. (See *Children.—Minors.*) Where the pursuer is resident out of Scotland, the action must be brought in his name and that of a mandatary, authorized by a written mandate, who is liable to the defender for the expences. (*a*).

On the death of the person who originally stood in right of the claim, his executor may insist in it against the person liable, whether it arise from a civil cause, or be a claim of reparation for the patrimonial consequences of a crime or wrong: and this equally whether the original creditor had raised action before his death or not; except in the case of *penal* actions (*i. e.* certain actions in which the creditor is entitled to recover, not only the actual damage or loss, but extraordinary damages or reparation, by way of penalty, such as *spulzie*, when it includes violent profits), which rarely occur before justices, in which action must have been brought, and proof allowed, against the original party, in order to make them transmit. Before an executor can insist in a claim of his predecessor, he must, if the defender require it, produce a confirmation as executor from the commissary court.

2. *Defender.*

When a minor is to be sued, his father, if alive, or his tutors or curators, if his father be dead, must be called along with him. (See *Minors.*) When a married woman is to be sued, where that is competent, her husband must be called along with her. (See *Marriage.*) An attorney *defending* in an action for persons abroad, is not liable for the expences (*b*).

On the death of a person liable to a civil claim, whether from contract, or for the actual patrimonial damage arising from a wrong (*e. g.* the expence of curing bruises, and the loss of business from the confinement occasioned by them), the claim transmits against his representatives, even (unless in

(*a*) Potter and his father against Robertson, 25th July 1739, Kilk. p. 212.—O'Haggan against Boyd, 31st July 1761.—Hope against Mutter, 19th June 1797.

(*b*) Leigh against Rose, 10th Dec. 1792.

penal actions) though process was not raised against the ancestor (*a*). Where action has been raised against the party during his life, it must be *transferred* against his representatives (*b*). Where the representatives do not reside in the territory of the judge, the supreme court alone can transfer (*c*). The justices can sustain action against representatives (*d*), if amenable to their jurisdiction (see *Forum*), where the action is of a nature which would have been competent before them against the original debtor.

*See Declinature.—Forum.—Process.*

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## PAYMENT.

QUESTIONS on this subject may occur before Justices of the peace in the exercise of their civil jurisdiction.

*Partial payment.*—The creditor cannot, unless it was so stipulated, be compelled to receive payment of part of his debt (which may sometimes be undesirable). A creditor in two or more separate debts cannot refuse the payment of any one of those debts, though the debtor should decline to clear off even the interest on the others (*e*).

*Indefinite payment.*—When a debtor in several debts to the same person makes an indefinite payment, the application (unless when some high penal certification would follow) is made in the manner most favourable to the creditor: for example, to the debt least secured, or to the debt which would otherwise be prescribed, or to the debt which bears no interest, or to the interest before the principal. Where one of the debts is secured by a cautioner, the other not, an indefinite payment after the debtor's bankruptcy must be applied to them proportionally (*f*).

*Payment beforehand.*—Payment of rent by a tenant to a landlord before the term of payment, is deemed collusive in a question with the creditors or singular successors of the landlord. Such payment will not avail the tenant in whose hands the landlord's creditors had arrested the current rents before

(*a*) Erskine, iii. 1. 15.—iv. 1. 14.—McNaughton against Robertson, 17th February 1809.—Morrison against Cameron, 25th May 1809.

(*b*) Erskine, iv. 1. 60.

(*c*) Ibid. 61.

(*d*) Johnstone against Kelloe, 19th January 1803.

(*e*) Erskine, iii. 4. 1.

(*f*) Ibid. 2.

the term, even though the arrestment was used after he had made the payment. The same holds in payments by a vassal to his superior before the term. But in common debts, where the debtor and creditor are not connected, the debtor may safely pay before the term of payment (*a*).

*Proof of payment*—If the claim of debt be in writing, the discharge ought to be in writing, and ought to be a *probative* writing, (see *Proof*, sect. Civil Writing), though under L.100 Scots (*b*). Failing this mode of proof, recourse must be had to the creditor's oath of verity, if the obligation was for payment of money (*c*), though payment was made in goods (*d*). If it was for performance of a fact, such as delivery of goods, and performance is alleged to have been made in terms of the obligation, proof by witnesses is ordinarily admissible (*e*).

Even where the obligation is not in writing, payment exceeding L.100 Scots ought to be vouched by writing (*f*). But witnesses are admitted to prove,—1. Payment made *unico contextu* (at the same time) with the bargain; as if one buys a horse in the market, and pays for it at the moment. 2. Payment made on delivery of the article for which it is due, that being the time agreed upon for payment: because in both those cases the debt was paid the moment it was constituted, and the witnesses could not be mistaken in the connexion or application of the payment. 3. A train of facts from which payment is to be inferred, especially if interspersed with written adminicles, though it would not have been admitted to prove direct payment in the circumstances.

*Presumption of payment*.—Payment is presumed if the written voucher of the debt be in the hands of the debtor or cautioner, unless it be positively proved that it came into his hands otherwise than by the creditor's consent for a discharge (*g*).

Payment is also presumed if the creditor cannot produce the voucher of debt, though it be not in the hands of the debtor.

(*a*) Erskine, iii. 4. 4.

(*b*) Grierson against King, 4th July 1781; and cases there cited.

(*c*) McGill against Forrest, 15th November 1622, Dict. ii. 223.—Nisbet against Short, 15th July 1624; Durie.—Executors of Ferguson against Campbell, 28th June 1631; Dict. ii. 224.

(*d*) Tenant against L. Traquair, 8th February 1606; Dict. ii. 225.—Porteous against Lord Harries, 11th December 1632; Durie.—Macduff against Stewart, 11th December 1674; Stair.

(*e*) Little against Hillstones, 13th January 1620; Dict. ii. 224.—Hamilton against Lady Pittenweem, 26th July 1626; Dict. ii. 224.—Bisset against Bisset, 25th November 1624; Durie.—Bennet against Foulden, 16th January 1629; Dict. ii. 225.—Executors of Ferguson, *supra*.—Lady Abergeldie against her Son, 23d July 1638; Durie.

(*f*) Act of Sederunt, 8th June 1597.—Earl of Lauderdale against Tenants of Swinton, 7th January 1662; Stair. (g) Erskine, iii. 4. 5.

It is presumed to have been cancelled, if the debtor deny the subsistence of the debt, or if the debt was incurred by his predecessor and he know nothing about it. But the creditor has a remedy in a *proving of the tenor* before the Court of Session, in which he may establish the *tenor* or terms of the voucher, and the way in which it was lost.

In all yearly or termly payments, as of rent, feu-duties, interest of money, salaries, pensions, &c. three consecutive discharges granted by the creditor for the yearly or termly duties found a presumption that all preceding duties have been paid. Where rent or feu-duty is payable partly in grain, which is only payable once a-year, the discharges must be for three consecutive *years*. Where the rent is in money, payable half yearly, or where salary or the interest of money is payable half yearly, the discharges must be for three consecutive *terms*. There must be three regular consecutive discharges in full for successive contiguous periods; two discharges, though containing the duties of three or more consecutive years or terms, are not sufficient (*a*). Discharges by a deceased creditor and those by his heir cannot be joined together to make up the number, unless it appear that the heir knew of those granted by the deceased. Three consecutive discharges by an administrator, as a tutor or a steward, operate back only to the commencement of such person's administration. Arrears constituted into a debt, by a bond being granted for them, subsist notwithstanding three subsequent consecutive discharges; as do arrears contained in a decree. This method of extinguishing arrears, being founded entirely on presumption, may be elided by the defender's oath (*b*).

For other modes of extinguishing obligations, see *Prescription*.—*Compensation*.

## PERJURY, PREVARICATION, AND SUBORNATION OF PERJURY.

### I. PERJURY.

PERJURY is the judicial affirmation of falsehood upon oath. A plain falsehood must be affirmed. It must be affirmed absolutely: perjury will not be committed if the person have sworn doubtfully, "to the best of his recollection," on facts

(*a*) Erskine, iii. 4. 10.

(*b*) *Ibid*.

which he might reasonably have forgotten. It must be affirmed wilfully by one who knows the truth and improperly resolves to conceal it: perjury therefore cannot be committed in oaths of credulity appointed in certain cases, as in law-borrows or oaths of calumny, where the law means absolutely to trust the person swearing, or where, from the nature of the thing, no conclusive evidence can be obtained of his consciousness of the falsehood. The oath must be material to the matter at issue. The affirmation must be on oath; except by peers in certain cases (see *Proof*) and by quakers (see *Quaker's affirmation*). It must be made before one having authority by law to exact or receive an oath in that matter; an oath to a private person, or a voluntary affidavit, not required or acknowledged by law, before a magistrate, is not sufficient. It must be in the ordinary form and complete. Falsehood to an oath, that is, a person's breaking a promise or engagement which he had made on oath, is not perjury. A falsehood of any sort infers perjury, whether for a civil or for a criminal cause, and whether by a witness or by a party. An oath of credulity is perjury, where it can be shewn that the party did not believe what he swore that he believed (*a*).

The oath must be proved in writing, where it ought to have been taken in writing: in other cases, by intelligent unsuspected witnesses. The falsehood of it may be proved by parole evidence. It must be proved to have been wilful falsehood (*b*).

The punishment is arbitrary: it may in an aggravated case be any thing short of death or demembration. Conviction by a jury or by the Court of Session infers infamy, and disqualifies from ever again being received as a witness (*c*). (See *Punishment*, sect. Pillory.)

This crime can be prosecuted only before the Court of Justiciary originally, and the Court of Session incidentally. It may be prosecuted either by the public prosecutor, or by the private party shewing a sufficient interest; which not only any actual loss or suffering by the false oath is held to be, but even the alarm which he must feel from the false oath, though the evil intended by it have not followed (*d*).

Justices may have occasion to arrest for this crime; but the farther investigation is, from its difficulty and delicacy, generally left to the sheriff. (See *Arrest*, &c.)

(*a*) Hume, i. 360-9.

(*d*) Ibid. 373-4.

(*b*) Ibid. 369-372

(*c*) Ibid. 372-3.

## II. PREVARICATION.

Prevarication upon oath is the wilful concealment of truth by an artful, and chicaning oath, not by the averment of direct falsehoods (for that is perjury); or if such falsehoods have been ventured upon, not persisting in them till the close of the oath. "This sort of guilt is chiefly to be gathered from the "evasive and equivocal answers of the witness, the inconsistency of the different parts of his oath, and his affected ignorance and want of memory with respect to things which it behoves him to know; more especially if he is at last driven from all these shifts, and is constrained to emit a true, though, taken on the whole, an incoherent and contradictory deposition. As a scandalous contempt of the presence of the court, and of the reverence of an oath, this offence may be summarily punished by the judge before whom it happens; and, it rather appears, only by him, and "at that time" (a). The proper punishment appears to be imprisonment (b). At one time pillory was sometimes applied in more flagrant cases (c); but, by special statute, that punishment seems now to be limited to perjury and subornation of perjury (d). (See *Punishment*, sect. Pillory.)

## III. SUBORNATION OF PERJURY.

Subornation of perjury is the procuring a person to give false evidence as a witness. It is punishable in the same manner as perjury (e). The observations made as to the trial and precognition of perjury are equally applicable to this offence.

The attempt to suborn, though it does not amount to subornation, is highly punishable (f); as are also all practices to procure false evidence (g).

"If, in the course of any criminal trial, or of the preparations for it, and relative proceedings, a discovery is made of any evil practice, tending to mislead, constrain, or corrupt the witnesses, or to destroy, suppress, or alter evidence of any kind, and whether this has taken place on the part of the prosecutor or of the pannel, or even of their friends or favourers, or by one witness with respect to another; any such malversation may be summarily punished with fine or imprisonment, according to the degree of the offence; and this either on complaint to the court, or, in some of those

(a) Hume, i. 374.

(b) Ibid.

(c) Ibid.

(d) 56 Geo. III. c. 138, sect. 1.

(e) Hume, i. 373.

(f) Ibid. 376-7.

(g) Ibid. 377.



"cases, on the knowledge and *ex proprio motu* of the court themselves" (a).

See *Courts*, sect. Offences against Judges.

## PIGEONS, &c.

JUSTICES of the PEACE are directed to execute the acts against "breakers of dove-houses and cunninghares (rabbit-warrens) stealers of bees and bee-hives;" "in the trial whereof they shall proceed by witnesses, or by oath of party; and the punishment to be inflicted by them shall be a pecunial sum, answerable to the circumstances of the offence, and quality of the offenders" (b). The punishment prescribed by the old acts is, the damage for every offence, and L.10 Scots to the owner, for the first offence, L.20 Scots for the second, and L.40 Scots for every subsequent offence (c). And it is thought to be proper not to exceed these sums upon this procedure. Cases requiring higher punishment may be tried at common law upon ordinary proof. See *Theft*.—*Mischief*.—*Proof*, sect. Criminal.—*Punishment*.—*Arrest*, &c.

It is not lawful to shoot pigeons belonging to others (d). Justices may award damages for it under the small debt act; and probably they may, in a strong case, punish for the mischief at common law (e). See *Justices*, sect. Particulars not in Commission.—See *Mischief*, *malicious*.

## PIRACY.

PIRACY, or robbing on the sea, is a crime against the law of nations, and always capital. It may be punished wherever

(a) Hume, l. 378.

(b) 1661, c. 38.

(c) 1679, c. 84.

(d) Murray against Turnbull, 19th January 1797.

(e) A complaint on 1576, c. 16, and 1597, c. 270, for shooting pigeons, is not competent before justices, those acts having passed before their appointment, and not having afterwards been specially committed to them; Murray, *supra*. The act 2 Geo. III. c. 29, against destroying pigeons, does not extend to Scotland; Murray, *supra*.

committed, by whomsoever, or against whomsoever. He is a pirate who goes out to cruise without a lawful commission to use force, or who grossly and wilfully abuses a lawful commission. It is piracy to take either the ship, or the effects, or the persons in it, or belonging to it. It is piracy in the crew to run away with the ship. Compulsion exculpates; but not if the person afterwards freely assent (*a*).

It can be tried originally before the Court of Admiralty only (*b*); but, of course, the Supreme Criminal Court have a power of review (*c*). Justices of the peace are competent to secure the guilty, and take precognitions. (See *Arrest, &c.—Wrecks*).

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## PLAGUE.

AN act has been passed (*d*), with regard to quarantine by ships coming from places subject to the plague, or infected by it, by which certain offences are created, and are directed to be tried by justices of the peace; and certain felonies are created, for which, of course, they may arrest and precognosce. It is impossible to give a view of those provisions, such as would be at all serviceable in practice, without much greater length than would be proper; particularly as questions with regard to quarantine can hardly occur before justices of the peace in Scotland. If such a question should occur, the act cited, and the Orders in Council (which the act authorises to be issued) must be consulted. The act is in the hands of the revenue officers.

The act also gives power to the Privy Council to give orders and directions in case of any infectious disease breaking out on shore.

Justices of the peace are directed by the general act, "to set down order in the country, for governance in time of plague, and to punish severely the disobeyers" (*e*). But this malady, which at one time made great ravages in Scotland, is happily now unknown in this country.

(*a*) Hume, i. 478-9.  
(*d*) 6 Geo. IV. c. 78.

(*b*) 1681, c. 16.

(*c*) Hume, i. 479.  
(*e*) 1661, c. 38.

## PLANTING AND INCLOSING.

## I. PROVISIONS TO FACILITATE AND ENCOURAGE.

CERTAIN provisions have been made to facilitate and encourage planting and enclosing, with regard to which justices of the peace have jurisdiction (*a*).

1. *March fences.*

Where inclosures fall to be upon the border of any person's property, the adjacent heritor is to be at equal charges in building, ditching, and planting, the dike which divides their properties. The execution of this act is committed to sheriffs and stewards, justices of the peace, bailies of burghs, and all other judges (*b*). The act does not extend to small properties not exceeding five or six acres, *e. g.* small feus (*c*). This provision reaches the bounding fence in its whole extent, unless where the operation seems chimerical, from the charges of constructing and maintaining the inclosure being such as would not be compensated by the resulting improvement (*d*). It extends to any kind of fence, suitable to circumstances, which has been consented to by the adjoining heritor. If the parties differ as to the kind of fence, the judge must determine (*e*) upon inspection or report. Where the march is a rivulet, which is not a sufficient fence, a proper fence may be built upon the spot, if it be practicable; and where the opposite party wishes it, the stream ought to "run a space within the dike and a space without the dike, that either party may have the benefit of watering thereat" (*f*).

The neighbouring heritor is not liable for his share of the expence of the march-dike, unless requisition have been made to him to concur; for he ought to have a voice in the kind of fence to be erected (*g*). But though he have not been re-

(*a*) The provisions in 1457, c. 80; 1457, c. 83, 1503, c. 74, 1535, c. 10, 1661, c. 41, to compel landholders to plant and enclose, have not for a long time been acted upon; and never fell within the jurisdiction of justices.

(*b*) 1661, c. 41, and 1685, c. 39, found perpetual in Riddel against Marquis of Tweeddale, 5th December 1769.

(*c*) Penman against Douglas and Cochrane, 3d July 1739; C. Home, No. 123; Kilk. Planting, No. 1.

(*d*) Earl of Peterborough against Garioch, 15th June 1784—Earl of Cassillis against Paterson, 28th February 1809.

(*e*) Douglas against Penman, 24th January 1739, in Kilk. tit. Planting, No. 1.

(*f*) Earl of Crawford against Rig, 21st July 1669; Stair.

(*g*) Ord against Wright, 23d February 1738; C. Home, No. 91.

quired, yet if he take the benefit of the inclosure, he will be liable, in so far as he is a gainer (*a*).

The fence must be maintained at the common expence, if the party wishing to take the benefit of it make requisition for that purpose; otherwise he must be at the whole expence himself. This obligation, mutually to support the march-fence, applies though it was not originally built at mutual expence, under the act of Parliament (*b*).

## 2. *Straightening marches.*

As there may be inconveniency in executing the preceding provision with regard to the constructing of march-fences, where the line of march is crooked or unfit for a fence, it is provided, that, when an heritor intends to inclose by a dike or ditch upon his march, which is crooked or unequal, or where any part is unfit for a dike or ditch, or hinders the completing the inclosure in an equal line, he may require the next sheriffs, stewarts, justices of the peace, or other judges ordinary, to visit the marches, who are to adjudge such parts of the one heritor's ground to the other, as occasion the inconvenience, in the manner least prejudicial to either party; and that the dike or ditch so to be made is to be in future the common march; and that, after estimating and compensing the parts adjudged, the judge is to decern what remains uncompensated of the price; and that the parts adjudged are in future to be parts of the property to which they are annexed (*c*). The straightening is not limited to small parcels of ground, but reaches to the quantities which produce the inconveniency, though they should amount to several acres (*d*), if they be upon an extensive line of march, and thus form only a small proportion of the properties from which they are taken. But the statute seems misapplied in taking from small properties parts which, though small in themselves, bear a considerable proportion to the properties from which they are taken.

Marches may be straightened though the portions which require to be cut off be parts of an entailed estate; but, in that case, the land received in exchange must be fettered with the same irritant and resolute clauses as that taken away; and if money was decerned for, it should be tailsied, or employed on lands in the same manner (*e*).

(*a*) *Seaton against Seaton*, 9th January 1679; *Stair*.

(*b*) *Lockhart against Sievwright*, 20th January 1758.

(*c*) 1669, c. 17. 1685, c. 39.

(*d*) *Erskine*, l. 4. 3.

(*e*) *Ramsay against Primrose*, 10th January 1702; *Fount*.

3. *Runrig*.

Where lands lie *runrig*, that is, where the alternate ridges of a field belong to different parties (*a*), either party may apply to the sheriffs, stewarts, or justices of the peace, of the shires where the lands lie, who divide them according to the interests of parties, after citation of all concerned, at a day appointed. Those judges must make the allotment as convenient as may be for the mansion-houses and policy. This division is not competent in the case of "borough and incorporate acres" (*b*).

The division is competent by practice, even where the properties are broken off, not by single ridges, but by roods or acres (*c*). But it does not extend to pieces of ground exceeding four acres (*d*). Small parcels of land surrounded by a greater estate, and lying at a distance from each other, but each parcel lying contiguous, and not *runrig*, have been found not to fall under the act (*e*). In like manner, where the first and third of four small properties belonged to one person, and the second and fourth to another, the act was found not to apply (*f*). It was found in one case, that where a considerable part of a piece of ground had been feued out in small parcels, from time to time, to different proprietors, and where several of those small parcels, separated from each other by others of these small parcels, had come into the person of one proprietor, a division of them and the interjected parcels, as *runrig*, was competent (*g*). It has been found that the division is competent to feuars, even against their superior, though some of the feuars, called as defenders, have their several properties in one plot, each by himself, surrounded by the lands lying *runrig* (these particular feuars making no objection themselves) and although the *runrig* lands lie in the neighbourhood of a burgh of barony; and that it is competent in the division to set off the shares of the parties on either side of the town, as may be most convenient for the general interest, without regard to the previous local possession of individuals (*h*).

The mansion-house, however mean, must be respected in

(*a*) Erskine, iii. 3. 59.

(*b*) 1695, c. 23.

(*c*) Ersk. iii. 3. 59.

(*d*) Lady Grey against Blairs, 17th January 1782.

(*e*) Sir John Hall against Callander, 7th December 1744; Dict. iv. 246; Falc. i. 21.

(*f*) Murison against Drysdale, 14th July 1780.

(*g*) Douglas and Forrest against Inglis and others, 21st January 1777; in Morrison's Dict. *Runrig*, App. No. 2.

(*h*) Russel and others against York Buildings Company and others, 28th January 1774.

the division (*a*). The office-houses cannot be included in the division (*b*).

The division takes place immediately without regard to current tacks. The tenant must accept the new ground acquired by his landlord in place of that taken from him (*c*). It is not necessary to make the tenants parties. It is presumed that their landlord will look to their interest. If he do not, they can recur against him upon the warrandice in their leases (*d*).

For casting about highways in order to encourage planting and inclosing, see *Highways*, sect. Widening, Altering, and Shutting up Highways, not being Turnpike Roads.

## II. PROVISIONS FOR PREVENTING AND PUNISHING INJURY, AND INDEMNIFYING OWNERS.

### 1. *Subsisting Scots acts.*

The provisions to encourage planting and inclosing, which have now been noticed, were accompanied with others to prevent injury being done to planting and inclosures. And justices of the peace are directed, by the general act (*e*), to "put his Majesty's acts to execution against cutters and destroyers of planting, greenwood, and orchards, gardens, haynings; in the trial whereof they shall proceed by witnesses or by oath of party; and the punishment to be inflicted by them shall be a pecunial sum, answerable to the circumstances of the offence, and quality of the offender."

Some of the ancient Scots acts thus committed to justices have been superseded by more recent British acts on the same subjects, enacting higher penalties, and, in some instances, prescribing modes of procedure a little different. Those only of the Scots acts shall be noticed which do not appear to have been thus superseded.

Where the Scots acts specify a penalty, it seems proper not to exceed it. Where, as sometimes for the third offence, this limitation does not apply, the penalty seems to be in the discretion of the justices. The penalties prescribed have varied from time to time; having been gradually raised in proportion to the depreciation in the value of money. The following seem to be the most recently appointed.

(*a*) Taylor against Earl of Callander and Shaw, 7th Dec. 1698; Fount.

(*b*) Gray against Wardrop, 14th January 1777; Morrison's Dict. Runridge, App. No. 1.

(*c*) Bruce against Bruce, 15th May 1792; Dict. iv. 247.

(*d*) Bruce, *supra*.

(*e*) 1661, c. 38.

(1.) *Injuring and leaping over inclosures.*—If any person break down or fill up any ditch, hedge, or dike, by which ground is inclosed, or leap or suffer his horses, nolt, or sheep, to go over such, he forfeits L.10 Scots for each offence; half to the heritor whose fences have been so leaped over, &c. half for repairing the bridges and highways within the parish, at the sight of the sheriff, steward, or justices of the peace before whom the contraveners are pursued (a).

(2.) *Breaking into yards or orchards.*—Whoever breaks into yards or orchards is liable, in all cases, for the damage; and for the first offence in L.10 Scots; for the second in L.20 Scots; for every subsequent offence in L.40 Scots; all to the owner (b).

(3.) *Herding.*—All heritors, liferenters, tenants, cottars, and others, must cause herd their horses, nolt, sheep, swine, and goats, winter and summer, and at night keep them in houses, folds, or inclosures, that they may not eat or destroy their neighbour's ground, woods, hedges, or planting. Those contravening must pay half a merk (for every offence) for every beast they have going on their neighbour's ground, besides the damage done to the grass or planting; and the heritor or possessor of the ground may detain (or *poind*, as it is called) the beasts found by him upon his ground, till he be paid the half merk, and the expence of keeping the beasts (c). The right of retention is understood to extend to the damages (d).

This act applies where damage is done to corn as well as where it is done to grass or planting (e). It applies where the trespass is committed over a march-fence (f). It applies though the cattle trespassing be not poinded (g). It applies

(a) 1661, c. 41, found perpetual in Dunbar against Gordon, 28th July 1713; Forbes—1685, c. 39.

(b) 1579, c. 84.

(c) 1686, c. 11.—Some persons doubt whether procedure under this act be competent before justices. On the one hand, it is posterior to the general statute giving them jurisdiction under the acts regarding planting and inclosing. It does not itself confer jurisdiction on them. There appears no decision finding or implying that it is competent before them. It is understood not to have been universally acted upon by them. The half merk is thought to be not so much a penalty as liquidated damages, to which, being a civil claim of indefinite extent, justices should not easily sustain themselves competent. On the other hand, the acts 1685, c. 39, and 1698, c. 18, in the two next sections, which are also posterior to the general act, and do not mention justices, seem competent before them. See next note. It is understood to have been sometimes acted upon by justices. It is given by Hutcheson and Boyd without comment. The half merk does not seem essentially different from the forfeitures in the two next sections.

(d) Erskine, iii. 6. 28.

(e) Govan against Lang, 18th February 1794.

(f) Loch against Tweedie, 3d July 1799.

(g) Shaw and Mackenzie against Ewart, 2d March 1809.

though a herd be kept (*a*). If he who pounds cattle for trespassing use them himself, or do not put them into a poundfold, or other place where they may have fodder and water, he is liable in a spuilzie (*b*). A person pointing cattle ought immediately to acquaint the owner, that he may relieve them (*c*).

(4.) *Injuring trees*.—If any person cut, break, or pull up any tree, or peel the bark off any tree, he forfeits (to the proprietor of the ground) L.10 Scots for each tree within 10 years of age, and L.20 Scots for each tree above that age; and the haver or user of the tree is liable in the same penalty, unless he can produce the person from whom he got it; and if the person convicted cannot pay the fine, he is to work a day, for each half merk contained in the fine, to the heritor whose planting is injured (*d*). This extends to natural wood, if inclosed and taken care of (*e*), and to fruit trees (*f*).

(5.) *Tenants answerable for family*.—It is enacted, “That all tenants and cottars shall preserve and secure all growing wood and planting that is upon the ground they possess; that none of it shall be cut, broken, or pulled up by the roots, or the bark peeled off any tree, and that under the pain, to be exacted by their masters alienarly” (their landlords only) “of ten pounds Scots for each tree within ten years old, and twenty pounds Scots for each tree that is above the said age of ten years, unless the samen be done by warrant and order of the said master and heritor of the ground; and ordains the tenant to be liable for his wife, children, and servants, or any others within his family, that shall contravene this present act” (*g*).

It seems now to be understood, that tenants are liable only for damages proved to have been done by their wives, children, servants, or others in their family; though it was at one time thought that they ought to be liable for damage done by strangers, or that at least there was a presumption of the damage having been done by their family, which it lay with them to remove by proof to the contrary (*h*). A tenant was found not

(*a*) Turnbull against Coutts, 23d February 1809,—Shaw and Mackenzie against Ewart, 3d March 1809.

(*b*) Erakine, iii. 6. 2.—Duncan against Kidds, 10th February 1676; Stair.

(*c*) Bankton, iv. 41. 8.

(*d*) 1685, c. 39.—Prosecutions upon this act seem competent before the justices; prosecution before justices, upon 1698, c. 16, which is an extension of it, having been brought under review of the Court of Session without any question being moved upon their competency.

(*e*) Buchanan against Malcolm, 3d March 1784.

(*f*) Robertson against Robertson, 24th July 1743; C. Home, No. 248; Kilk. Planting, No. 2.

(*g*) 1698, c. 16.

(*h*) Though this seems new understood; and though it has been found in



liable for damage, during his possession, by cutting natural trees, the ground where they grew having been in use to be pastured upon by horses, milt, and sheep, as well before as since his possession; and those trees not having been preserved, in time bygone, to be cut for sale, and not being worth preserving and securing for sale (*a*). It was held in one case that those penalties may be modified (*b*).

Those which have been noticed are the subsisting Scotch acts which fall under the jurisdiction of justices of the peace in consequence of the general statute.

## 2. *British acts.*

Various British acts have been passed on the subject of planting and inclosing, the execution of which is specially committed to justices of the peace. These are now to be noticed.

(1.) *Damages from parish, &c. for injuring trees.*—If any person maliciously break down, cut up, bark, destroy, or spoil any timber tree, fruit tree, or other tree, the person damaged is to receive satisfaction from the inhabitants of the parish, ville, or hamlet, where the trees are destroyed; if in Scotland, to be recovered by way of summary action, as damages in other cases of riot (see *Damages*, sect. Riots); unless the offender be convicted by the parish, &c. within six months (*c*).

The inhabitants of a ville or village are liable, without relief from the rest of the parish, for trees destroyed, if the tenement of the owner be within, or part of, the ville or hamlet; but ought to be allowed time to stent themselves. They are also liable, but have relief from the parish proportionally, if the tenement be not comprehended within the village, allowing time for stenting (*d*).

(2.) *Punishment for injury.*—Any two justices of the county, &c. or the justices in sessions, on complaint by any inhabitant of any parish in which any tree is destroyed, or of the owner of the trees, or of any other, may cause the offender to be apprehended, and hear and determine the offence; and, on conviction, are to commit the offender to the house of correction, to be kept at hard labour for three months; and where there are no houses of correction, they are to commit him to prison

one or two unreported cases, there is no reported case directly finding so; but it seems to be implied in the last reported case on the subject; Cooper against Campbell, 18th January 1805.—And see Kames' Statute Law, voce Reparation.

(*a*) Fergusson against Macniddier, 24th July 1734; Dict. II. 87.

(*b*) Cooper against Campbell, 18th January 1805.

(*c*) 1 Geo. I. c. 48, sect. 1.

(*d*) Nasmyth against Inhabitants of Water of Leith, 17th November 1719; Dict. II. 87.

for four months (a). The act orders frequent whipping; but this is seldom inflicted by justices in Scotland. See *Punishment*.

Before the offender be discharged, he is to find sureties for his good behaviour for two years (b).

(3.) *Injuring or carrying away trees or plants at night, &c.*—Every person who, in the night time, lops, tops, cuts down, breaks, throws down, barks, burns, or otherwise spoils or destroys, or carries away any oak, beech, ash, elm, fir, chesnut, or asp, timber tree, or other tree standing for timber, or likely to become timber, without the consent of the owner, or who in the night time plucks up, digs up, breaks, spoils, or destroys, or carries away any root, shrub, or plant, of the value of 5s. within garden ground, nursery ground, or other inclosed ground, may be transported for seven years; and any person wilfully aiding or abetting in any of these offences, or buying or receiving the roots, &c. knowing them to be stolen, is to be liable to the same punishment as if he had stolen them (c). In any case of that description, which requires a punishment at all approaching to this, the justices (who cannot inflict such) ought to secure the criminal, and take measures for having him tried by a court of greater powers. See *Arrest, &c.*

Several other British acts have been passed for preserving planting; but they do not seem to extend to Scotland. Nor are they necessary in this country, where the vigour of the common law reaches all such offences (d). See *Theft*.

For the burning of trees, &c. see *Mischief, malicious, sect. Fire-raising*.

See *Game, sect. Trespassing*.

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## PLEDGE.

### I. AT COMMON LAW.

PLEDGE, or pawn (questions on which may occur before justices under the small debt act) is a contract by which a debtor puts into the hands of his creditor a moveable subject, in security of the debt, to be redelivered upon payment (e). To

(a) 1 Geo. I. c. 48, sect. 2.

(b) *Ibid.* sect. 3.

(c) 6 Geo. III. c. 36.

(d) It seems very doubtful whether 6 Geo. I. c. 16, 6 Geo. III. c. 48, 9 Geo. III. c. 41, 13 Geo. III. c. 33, extend to Scotland. It is understood that they have not been acted upon.

(e) Erskine, iii. 2. 33.

constitute it, there must be the contract of the parties, which may be verbal, and may be proved by witnesses ; and there must also be delivery to the creditor, otherwise the subject may be effectually pledged or sold to a third party, if such third party first obtain delivery.

The creditor is entitled to hold possession, exclusive of the owner and of every person claiming through him, whether by sale or by legal diligence : and he must not part with the possession to any person, *e. g.* by location, loan, pledge, or the like. In particular, he must withhold possession from the owner. He is entitled to recover possession from the owner or any other person who has accidentally or by improper means obtained it.

Where the subject yields no natural fruits, and becomes impaired by use, the creditor is not entitled to use it. Where it yields fruits which must be reaped, *e. g.* a sheep, which yields wool, or a cow, which yields milk, the creditor may reap them ; but must impute them towards extinction of the debt, or of the expence of keeping the subject.

As this contract is for the benefit of both parties, the creditor is liable in a middle degree of diligence for preserving the subject. (See *Contract*.) If the subject perish during impignoration, without the creditor's fault, the loss falls on the debtor. The creditor has action for expences necessarily debursed on it (*a*).

When the creditor, on expiry of the time agreed, wishes payment from the subject, he must have the authority of a judge ; and his proper course is to make application to the judge ordinary for a warrant to dispose of it by public sale, to which the debtor must be made a party (*b*).

## II. BY STATUTE.

Certain regulations have been made by a recent statute (*c*) with regard to *pawnbrokers*, persons who lend money upon pledge for profit. They do not extend to persons lending money at 5 per cent. without further profit (*d*).

### 1. *Taking pawns, &c.*

Before a person can take pawns, his name, and the word "pawnbroker," must be placed over his door, on forfeiture of L.10 for every shop, &c. for each week, to be recovered by

(*a*) Erskine, iii. 2. 33.

(*b*) Ibid.

(*c*) 39 and 40 Geo. III. c. 99.—This act has been found by the justices of Mid-Lothian, after considerable discussion and investigation, to extend to Scotland ; and is pretty generally acted upon. Some persons, however, still doubt upon this point.

(*d*) Ibid. sect. 30.

distress, under warrant of two justices of the place, on confession of the party, or oath or affirmation (if a quaker) of one credible witness. Failing distress and immediate payment, those justices must, by warrant, commit to jail from three months to fourteen days, unless the penalty and reasonable charges be sooner paid (*a*).

A pawnbroker must not take a pawn from a person under 12 years of age, or intoxicated; nor purchase or take in pawn, pledge, or exchange, the note of any other pawnbroker; nor buy goods before eight o'clock in the morning, or after seven evening, throughout the year; nor employ any person under 16 years of age to take pawns; nor receive goods in pawn or exchange before eight morning, or after eight evening, between Michaelmas Day (29th September) and Lady Day (25th March), or before seven morning, or after nine evening, in the rest of the year, except till eleven evening of all Saturdays, and of evenings precoding Good Friday and Christmas Day, and every fast or thanksgiving appointed by the King; nor carry on the trade of pawnbroker on Sunday, Good Friday, Christmas day, or any fast or thanksgiving appointed by the King (*b*).

A pawnbroker receiving a pawn, on which a sum exceeding five shillings is lent, must, before lending, enter in a book a description of the pawn and the sum lent, with the date, name of the pawner, the street and number of his residence, adding "L," if a lodger, and "H," if a housekeeper; also the name and residence of the owner of the goods pawned, according to the information of the pawner. Where the loan does not exceed 5s. the description must be entered within four hours after pawning. Pawns for sums above 10s. must be entered in a book separate from all other pawns. The entry of each pawn for above 10s. must be numbered progressively from the beginning of each month; and upon every note respecting a pawn for above 10s. must be marked the number of that pawn in the book. The pawnbroker must, at taking the pawn, give to the pawner a note, containing the description above mentioned, in which must also be marked the name and abode of the pawnbroker; which note the pawner must receive, otherwise the pawnbroker is not to receive the pawn. For this note, when the sum is under 5s. the pawnbroker gets nothing; under 10s. a halfpenny; under 20s. a penny; under L.5, twopences; above L.5, fourpence. The note to be produced at redeeming the pawn (*c*). Pawnbrokers to place conspicuously in view a table of prices of notes, and of notes to be delivered gratis (*d*).

(*a*) 39 and 40 Geo. III. c. 39, sect. 23.

(*c*) Sect. 6.

(*b*) Sect. 16.

(*d*) Sect. 22.

2. *Redeeming pawns, &c.*

The owner may redeem his goods within a year after pawning (*a*). On notice upon or before the expiry of the year, given in writing, or in presence of one witness, to the pawnbroker, or left at his residence, not to sell at the end of the year, three months more than a year are to be allowed (*b*).

The note delivered to the owner, at pawning, must be delivered to the pawnbroker before he is obliged to deliver the pawn, except as after mentioned (*c*). Persons producing notes are to be deemed the owners, unless the pawnbroker have received previous notice from the real owners, or unless he have been informed that the goods are suspected to be stolen, and unless the real owner proceed as after mentioned (*d*). If the pawnbroker have received notice as above, or if the note have been lost, mislaid, destroyed, or fraudulently obtained, and the goods remain unredeemed, the pawnbroker must, on request, give to the person alleging himself owner, a copy of the note lost, &c. with a form of an affidavit of the circumstances, as stated, for which, if the sum lent do not exceed 5s. the pawnbroker receives a halfpenny ; if it exceed 5s. not 10s. a penny ; if it exceed 10s. the same as for an original note. The person must then prove his right, to the satisfaction of a justice of the place of pawning, and must swear, or affirm, as the case may be, the truth of the facts in the affidavit, which the justice certifies on the affidavit ; and on this the applicant may redeem the goods (*e*). Pawnbrokers must insert in the table before mentioned, conspicuously in view, the expence of obtaining second notes (*f*).

Pawnbrokers are restricted to the following profits :—For a pledge pawned for any sum not exceeding 2s. 6d. a halfpenny for any time during which the pledge has remained in pawn, not exceeding one calendar month, and the same for every calendar month afterwards, including the current month, though not expired. For any sum exceeding 2s. 6d. and not exceeding 40s. at the rate of fourpence for each pound (that is, a farthing for each sum of 1s. 3d. contained in it) by the calendar month, including the current month. For any sum exceeding 40s. and not exceeding 42s. eightpence by the calendar month, including the current month. For any sum exceeding 42s. and not exceeding L.10, at the rate of threepence for each pound (that is, a farthing for each sum of 1s. 8d. con-

(*a*) 39 and 40 Geo. III. c. 99, sect. 17.

(*c*) Sect. 6.

(*d*) Sect. 15.

(*e*) Sect. 16.

(*b*) Sect. 19.

(*f*) Sect. 22.

tained in it) by the calendar month, including the current month. And those sums are to be taken in full for interest and warehouse room (*a*). Pawnbrokers must give a farthing in change, when the borrower tenders a halfpenny, or must abate the remaining farthing (*b*). Goods may be redeemed within seven days after the expiry of any month without paying any thing for the current month: after seven days, and within fourteen, on paying half for the current month: after fourteen days, the borrower must pay for the whole month (*c*). Pawnbrokers must insert in the table before mentioned the profits allowed (*d*).

The amount of profits received must, at the time of redemption, be indorsed by the pawnbroker on the duplicates of the pledges redeemed; and those duplicates must be kept by him for the year following (*e*).

If goods be pawned for a sum not exceeding L.10, and profits, and if within a year, or a year and three months, after pawning, as the case may be, the owner tender the principal and profit, and the pawnbroker without good cause, refuse to redeliver the goods, on oath, or affirmation (if a quaker), by the pawner or other credible person, of those facts, and on his producing the note, any justice of the place of the pawnbroker's residence is to bring the pawnbroker before him, and is to examine on oath, or affirmation (if a quaker), the parties and such credible witnesses as shall appear before him; and, on tender of the money in due time being proved, and the owner paying it to the pawnbroker, or tendering it before the justice, if he refuse to accept it, the justice must grant an order for immediately restoring the goods; and if the pawnbroker refuse to deliver, or to make satisfaction, the justice is to commit him to the house of correction, or prison of the place, till delivery or satisfaction (*f*).

If, in any procedure before a justice, it shall be proved by oath, or affirmation (if a quaker), that pawns have been sold before the time, or improperly, or have been embzzled or lost, or injured by the fault of the pawnbroker, &c. he must award a reasonable satisfaction, to be deducted from the principal and profits; and if it exceed them, the pawnbroker to pay the difference, under the penalty of L.10, to be recovered and applied as after mentioned (*g*).

(*a*) 39 and 40 Geo. III. c. 99, sect. 2, 3.

(*c*) Sect. 5.

(*f*) Sect. 14.

(*d*) Sect. 22.

(*g*) Sect. 24.

(*b*) Sect. 4.

(*e*) Sect. 7,

3. *Forfeiture and Sale, &c.*

Pawned goods are deemed forfeited, and may be sold, at the end of a year, or of three months more, if notice was given as formerly mentioned. Pledges for more than 10s. not exceeding L.10, must be sold by public auction only; and the person employed to sell them by auction must expose them to view, and publish catalogues, containing the name and residence of the pawnbroker, and the month of pawning, and the number of the pawn as entered in the book; and an advertisement giving notice of the sale, and containing the name and residence of the pawnbroker and the month of pawning, must be inserted two several days in a newspaper, two days at least before the day of sale; and the goods must be entered in the catalogue apart from each other, under forfeiture to the owner of from 40s. to L.10 (*a*).

Pictures, prints, books, statues, &c. must be sold by themselves, on the first Monday of January, April, July, and October, and following days, if not then finished; and the seller must expose them to view, publish catalogues, and cause advertisement of the sale, containing the name of the pawnbroker, to be made two days in a newspaper, three days before the sale, under forfeiture to the owner of from 40s. to L.5 (*b*).

Pawnbrokers must enter in a book an account of sales of goods pawned for upwards of 10s. with the date of pawning, the name of the pawner, the date of selling, the price, with the name and residence of the auctioneer. The overplus, after paying the profits before mentioned, must be paid to the pawner, &c. on demand, within three years, deducting expence of sale. The pawner may inspect the entry, on paying a penny. On refusal of inspection, or if the price entered be below the truth, or if entry be not made, or if the goods be not sold according to this act, or on refusal to pay the overplus, the offender forfeits L.10, and triple the sum borrowed on the pawn, to the pawner, &c. to be levied by distress, under the hands of two justices (*c*).

A pawnbroker must not purchase goods while in pledge with him, except at the public auction; nor suffer goods to be redeemed, that he may buy them; nor make any contract about purchasing them, till a year after pawning (*d*).

The improper sale, embezzlement, or injury of goods, are noticed in sect. Redeeming.

(*a*), 39 and 40 Geo. III. c. 59, sect. 17.

(*c*) Sect. 20.

(*b*) Sect. 18.

(*d*) Sect. 22.

*4. Pawning or redeeming goods of others, &c.*

If any person designedly pawn goods without consent of the owner, any justice may grant warrant for apprehending him; and if he be convicted, by oath of one credible witness, or confession, before a justice of the place where the offence is committed, he forfeits from L.1 to L.5, and the value of the goods pawned; and if he do not immediately pay, he is to be committed to a public jail of the place where he resides, or is convicted to hard labour, not exceeding three months, unless sooner paid; the forfeitures to be applied to satisfy the party, and pay costs, as may be found reasonable by the judge convicting. If the party refuse to receive the satisfaction, or if there be an overplus, the sum or overplus to be paid to the poor of the parish or place of the offence (*a*).

The act authorizes whipping, if the forfeiture be not paid within three days of expiration of the term of imprisonment; but whipping is rarely inflicted by justices in Scotland. (See *Punishment*.)

If the owner of goods unlawfully pawned or exchanged make it out by his oath, or the oath of one witness (or affirmation, if a quaker), before a justice of the jurisdiction, that there is reason to suspect a person within the jurisdiction, to have taken such in pawn or exchange, and give probable grounds of suspicion, the justice may grant warrant for searching the place of the person charged, in the hours of business; on refusal to admit, the officer may break open in the hours of business, and no pawnbroker, &c. is to oppose. If, on search, such goods be found, and the property of them be made out to the satisfaction of any justice, by oath of one credible witness (or affirmation, if a quaker), or confession of the accused, the justice is forthwith to restore them to the owner (*b*).

If any person offering to pawn, exchange, or sell goods, cannot give a good account of himself, or of the way in which he became possessed of the goods, or wilfully give any false information to the pawnbroker as to the goods being his property, or of the name and residence of himself or the owner, or if there be any other reason to suspect that the goods are not legally obtained; or if any person not entitled to redeem goods attempt to do so, any person to whom the goods are offered, or with whom they are in pledge, may detain such person and goods, and deliver them immediately to a peace officer, to be taken before a justice of the place of the offence; and if the

(*a*) 39 and 40 Geo. III. c. 99, sect. 8.

(*b*) Sect. 13.



justice think there are grounds of suspicion, he may commit the person, for a reasonable time, for inquiry; and if, upon either of the examinations, the judge be satisfied of the person's guilt, he is to commit him to the jail of the place of offence, to be dealt with according to law, where the nature of the offence authorizes such commitment by any other law; and otherwise to be committed by the justice, not exceeding three months (*a*).

Persons buying or taking in pledge any goods of manufacture, after being put into a state of preparation, and before being finished, or linen or apparel entrusted to wash or mend, forfeit double the sum lent or given, to be recovered as other forfeitures, in this act, on conviction before a justice, by oath of one witness or confession, and must restore the goods in presence of the justice (*b*).

If the owner of such goods of manufacture, &c. make out by his oath, or that of one witness (or affirmation, if a quaker), before a justice of the jurisdiction, and give probable grounds of suspicion, that a person has been guilty of the offences in the immediately preceding sentence (sect. 11. of the act), the justice is to grant warrant to search, in the hours of business, the place of the person charged; and, if the owner refuse admittance, the peace officer may break open in the hours of business, and no person is to hinder search. If, upon search, such goods be found, and the property of them be made out to the satisfaction of any justice, by oath of one witness (or affirmation, if a quaker), or confession of the accused, the justice is to restore them to the owner (*c*).

If any person counterfeit a note, or knowingly utter such, the person to whom the note is offered may detain him, and deliver him to a constable, to be conveyed before a justice of the place of the offence; and the justice, if his guilt appear, is to commit him to the jail of the place, not exceeding three months (*d*).

##### 5. *Penalties, Prosecutions, &c.*

Pawnbrokers failing to make the required entries distinctly in books, forfeit, at the discretion of the justice convicting, not exceeding L.10; for any offence to which no special penalty is annexed, from L.2 to L.10. All penalties are to be levied by distress, under the hand of any justice of the place of the offence; half to the parties complaining, half (if not otherwise disposed of by this act) to the poor of the parish or place of the offence (*e*).

(*a*) 39 and 40 Geo. III. c. 99, sect. 10.  
(*c*) Sect. 12.

(*d*) Sect. 9.

(*b*) Sect. 11.  
(*e*) Sect. 26.

Executors, &c. of pawnbrokers, though the act extends to them, are not liable for any penalty personally, or from their own estate, unless incurred by their own act or neglect (*a*).

Prosecutions or informations must be brought within twelve months after the offence, and before a justice or justices acting near the place of the offence (*b*).

The overseers of the poor, on notice from a justice, may prosecute at the expence of the parish (*c*). Persons convicted of fraud, or of any felony, not allowed to prosecute or inform for offences against this act (*d*).

The inhabitants of the place of the offence are competent witnesses, though part of the penalty relieves the poor rate of the place (*e*).

In prosecutions against pawnbrokers, disputes between pawnbrokers and owners, or on any other occasion on which a justice sees it necessary, the pawnbrokers may be summoned to attend him with any book, note, or other paper necessary, in the state in which it was when the goods were pawned, under the penalty (without good excuse) of from L.10 to L.5, to be levied and applied as before mentioned (*f*).

Convictions are to be transmitted to the next general or quarter sessions, to be filed; at which next sessions any appeal must be discussed (*g*).

Persons convicted may appeal to the next general or quarter sessions of the place, on entering into a recognizance at the time of conviction with two sufficient sureties, in double the sum awarded, on condition to prosecute the appeal, abide the issue, and pay costs. If the judgment be affirmed, the appellant must immediately pay the sum adjudged, with costs to be awarded for the appeal; or, in default of payment, must suffer the pains provided by this act for persons not paying (*h*).

See *Hypothec.—Retention.—Spirituous Liquors.*

## POINDING.

POINDING is a diligence, proceeding upon decree, by which the debtor's moveable subjects are sold for behoof of the credi-

(*a*) 39 and 40 Geo. III. c. 99, sect. 31.

(*c*) Sect. 28.

(*f*) Sect. 25.

(*d*) Sect. 29.

(*g*) Sect. 34.

(*b*) Sect. 27.

(*e*) Sect. 33.

(*h*) Sect. 35.

tor who uses the diligence, or the property of them transferred to him, towards payment of his debt.

1. With regard to the circumstances which must attend a claim in order to make it a ground for poinding. It must be a debt of money; something to *pay*, not something to *do*: and where the obligation is for performance of a fact, the creditor, before he can use poinding, must have the damages arising from non-performance liquidated by the sentence of a court. It must be at the time due and exigible. It must be constituted by decree (*a*).

2. With regard to the subjects which may be poinded. These are, in general, all the moveables belonging to the debtor (*b*). This extends even to moveables attached to an immoveable subject, if meant to be separated from it, as growing corn (*c*), or other industrial crop, the instruments of a distillery, or the like; not, however, if they be an essential part of the immoveable subject, as the windows or doors of a house, or the wheel of a water-mill. But a debtor's horses, oxen, or other goods belonging to the plough, cannot be poinded while he is labouring his ground, not for fallow merely, but for immediate sowing, if he have enough of other moveables; for which search must be made (*d*). A debtor's goods may be poinded even in the hands of others, who have the use of them, or have some present claim over them; for instance, furniture in the hands of others to whom it has been let, who, however, must have the use of it during the agreed period, subject to a temporary infringement, in order to go through the necessary forms (*e*); or goods pledged, under the burden of the right of those to whom they have been pledged. Goods in the creditor's own possession even may be poinded. Goods arrested in the hands of a third party by other creditors may nevertheless be poinded. Goods *hypothecated* for the landlord's rent cannot be poinded so as to disappoint the landlord (see *Hypothec*). Some have thought that where the goods poinded have been redeemed by the friends of the debtor, they may be again poinded for any part of the same debt remaining unpaid; but this is harsh, and seems questionable.

3. With regard to the execution of poinding. Before it can proceed, a charge to pay within a certain number of days

(*a*) Registration by consent, to found *constructive* decree for execution, seems not competent in the books of justices, as they are not, properly, a court of civil jurisdiction.

(*b*) Erskine, iii. 6. 20.

(*c*) Ibid. 22.

(*d*) Ibid.—Lord Advocate against Forgan, 20th February 1811, Justiciary; Fac. Coll.

(*e*) Davidson against Murray, 11th Dec. 1784.

must be given to the debtor, and those days must be allowed to expire (a). In some counties the days of the charge are 15, in some 10, in some 6 (b); 15 seem the most regular number, being the number sanctioned by the common law. The greater part of the execution rests with the officer; and his duty in ingathering the goods, getting them appraised, offering them to the debtor for payment, and reporting the execution to the sheriff or other judge ordinary, that order may be given for their disposal, is explained in treating of the duty of constables. If the officer be prevented from proceeding with the poinding, by the goods being under lockfast doors, upon his returning an execution to that effect, and upon proper application being made by the creditor, the justices grant warrant of open doors, authorising the officer to break open doors, in order to proceed with the poinding (c). If the officer be deforced in executing the poinding, upon his returning an execution to that effect, and upon application by the procurator-fiscal, the party, or the officer poinding, a justice will grant warrant for arresting the deforcers, and for bringing them before any justice for examination; and the justices, or other competent court, will inflict an adequate punishment. (See *Deforcement*.—*Process*, sect. Criminal.—*Arrest*.)

It is enacted “that the messenger, or other person employed  
“in executing a poinding for debt, shall leave the poinded  
“goods in the hands of the debtor, with a schedule of the  
“poinded goods, and note of the appraised values (one appraisement being in every case sufficient), and shall forth-  
“with report his execution of poinding to the sheriff or other  
“judge ordinary, who shall give direction for keeping the  
“goods poinded in safe custody, and selling them by public  
“roup, after such publication, not shorter than eight free  
“days, nor longer than twenty, from and after the day when  
“the order was given, and at such time and place as circumstances may require, and give all necessary orders for intermediate security; any person who intromits with, or carries  
“off the goods in the meantime, in order to disappoint the  
“poinding, being liable in double the appraised value thereof;  
“and a note or minute of the sale, and of the sum arising  
“from it, must, within eight days of the sale, be lodged with  
“the clerk to the said sheriff or judge ordinary, and forthwith  
“marked by him as so lodged, within eight days after such  
“sale, to be made patent to all concerned for a fee of one shil-

(a) 1669, c. 4.

(b) Hutcheson's J. P. 3d edit. l. 291.

(c) Hutcheson's J. P. 3d edit. l. 322.

"ling; and the net sum arising from such sale, after deduction of all charges, or the goods, in case no offerers appear, are delivered over to the poinding creditor" (a).

The sheriff or other judge ordinary, upon the sale being reported, modifies the expences of the application and sale, and ascertains how much of the debt remains unpaid, after deducting the price of the goods, or their appraised value if they were delivered to the creditor; or, if the poinded goods exceed the debt, directs the proceeds to the amount of the debt, including interest and expences, to be paid to the creditor; and if the goods were delivered to the creditor, ascertains the surplus, for which the creditor is accountable to the debtor.

Poinding under the small debt act is executed summarily. (See *Small Debt Act*.)

Where an officer is obstructed in the execution of a poinding, by a claim, however groundless, or is deforced, the property of the goods is not transferred to the user of the diligence; so that another creditor completing a poinding will prevail. But if the deforcement be imputable to such other creditor, he will be cast in the competition (b). All who stop a poinding, whether by violence or by a collusive claim, are liable in the value of the goods which might have been poinded by the creditor (c).

When a person has his goods poinded as belonging to another, whether he have not sworn before the constable, or the constable have disregarded his oath, it is competent to him to prove before the sheriff, or other judge ordinary to whom the poinding is reported, that the goods are his own; but he must prove this by evidence different from his own oath; and strong evidence is required where, as is usually the case, the goods were in the possession of the debtor, the possessor of moveable goods being presumed to be the proprietor. And, on the other hand, where a constable executing a poinding sustains the claim of a third party as proprietor, whether upon a written title, or upon his own oath, the point of right is still open before the sheriff or other judge ordinary at the instance of the creditor (d). (See the Author's *Treatise on the Duty of a Constable*, sect. Poinding.)

It has been decided that, in carrying the poinding into effect by a sale, the powers of the sheriff are merely ministerial; and that, although he may order an investigation into the

(a) The present Bankrupt Act, 54 Geo. III. c. 137, sect. 4.

(b) Erskine, iii. 6. 27.

(c) Ibid.

(d) See Stair, iv. 47. 26.—Thomson's Messenger, p. 249.—Clark against Clark, 15th June 1824.

fact where third parties claim the effects which have been poinded as belonging to the debtor, it is only in cases where an objection stated by the debtor appears *ex facie* of the diligence that he has any jurisdiction to stop the poinding of effects belonging to the debtor; and that he cannot competently entertain the plea of compensation or other defence against the debt, the proper remedy in such cases being by suspension, in so far as that may be competent (*a*). In a former case, where an heritable creditor used a poinding upon the registered personal obligation in his bond, against the personal effects of his debtor, in disregard of an agreement of composition by the debtor with the personal creditors, founded upon a state of his personal funds, to which the poinder, as a personal creditor, was a party, and where it was objected by the debtor, before the sheriff, that that creditor was barred by the agreement from attaching the personal funds for payment of his heritable debt, it was found that the sheriff did right in entertaining the objection, and refusing a warrant of sale (*b*).

#### FORMS OF PROCEEDINGS.

[The civil decree pronounced by justices of the peace does not contain a warrant for diligence. But the extract of the decree (which bears the date of the decree) given out by the clerk of the peace, contains a warrant for immediate execution by arrestment, and for execution by poinding, after the expiry of the days of the charge. In the case of a decree by a sheriff or other judge ordinary, a precept of poinding and arrestment, proceeding upon the decree (and bearing the same date) is the usual warrant for diligence.]

##### 1. Charge.

" In virtue of an extracted decree of his Majesty's justices  
 " of the peace for the shire of \_\_\_\_\_, dated the  
 " day of \_\_\_\_\_, one thousand eight hundred and  
 " \_\_\_\_\_ years, in the claim at the instance of A B,"  
 "[design him] " against C D," [design him] " I, E F, con-  
 " stable, command and charge you the said C D to make pay-  
 " ment to the said A B of the following sums contained in the  
 " said decree," [mention the sums decerned for] " and that  
 " within fifteen days after this charge, with certification.  
 " This I do on this \_\_\_\_\_ day of \_\_\_\_\_, one thousand

(*a*) Clark against Clark, 18th June 1824.

(*b*) Mitchell against Cuddie, 14th June 1822.

" eight hundred and                      years, before these witnesses,  
 " G H, and J K" [design them].

" E F, Constable."

2. *Execution of charge.*

" Upon the                      day of                      , one thousand eight  
 " hundred and                      years, by virtue of the before written  
 " extracted decree of his Majesty's justices of the peace for the  
 " shire of                      , dated the                      day of  
 " obtained by A B," [design him] " against C D," [design  
 him] " I, E F, constable, lawfully commanded and charged  
 " the said C D, defender, to make payment to the said A B,  
 " pursuer, of the sums of                      contained in the said  
 " decree, and that within fifteen days from the date of the  
 " charge, with certification. A just copy of charge in virtue  
 " whereof, and to the effect foresaid, signed by me, and bear-  
 " ing the date hereof, and containing the date of the said de-  
 " cree, and the names and designations of the following wit-  
 " nesses, who were present at the premises, and hereto sub-  
 " scribing upon this and the                      preceding pages, I deliver-  
 " ed to the said C D, personally apprehended," [or as the case  
 may be. See *Process*] " before these witnesses, G H and J K"  
 [design them].

" G H, witness.

" E F, Constable."

" J K, witness.

3. *Oath to appraisers.*

" You swear that you will execute the office of appraisers,  
 " now committed to you, faithfully, and according to the best  
 " of your skill and ability."

4. *Schedule of poinded goods to be left with the debtor.*

" By virtue of a warrant of poinding, contained in an ex-  
 " tracted decrees granted by his Majesty's justices of the peace  
 " for the shire of                      , dated the                      day of                      ,  
 " one thousand eight hundred and                      years, in the  
 " action at the instance of A B," [design him] " against C D,"  
 [design him] " I, E F, constable, poinded, for payment of the  
 " sums of                      therein contained, the following  
 " effects, which were lawfully appraised of the following values  
 " by                      and                      " [design them]

A a

[specify the articles poinded, and the value of each.] " This  
 " I did, upon the            day of            one thousand eight  
 " hundred and            years, before these witnesses, G H  
 " and J K" [design them].  
 " G H, witness.            " E F, Constable."  
 " J K, witness.

### 5. Execution of poinding.

" Upon the            day of            , one thousand eight  
 " hundred and            years, by virtue of an extracted de-  
 " cree of his Majesty's justices of the peace for the shire of  
 "            , containing warrant to poind, dated  
 "            , obtained at the instance of A B," [design him]  
 " against C D," [design him] " for not making payment to  
 " the pursuer of the sums of            , toge-  
 " ther also with an execution of charge duly given, and the  
 " days of charge elapsed, and no payment made, I, E F,  
 " constable, passed, with the appraisers and witnesses after  
 " named and designed, to the dwelling-house of the said C D,  
 " defender, at            " [or as the case may be] " and  
 " then and there, after crying three several oyeses, making  
 " open proclamation, and publicly reading of the said decree  
 " and execution of charge, and demanding' payment of the  
 " foresaid debt, lawfully apprehended the goods after mention-  
 " ed, belonging to the said C D, defender, for valuing and  
 " appraising whereof I adduced            and  
 "            , " [design them] " to whom I administered the  
 " oath *de fidei administratione officii*, who accordingly, with  
 " one voice, estimated and appraised the same at the respective  
 " prices and valuations following, viz." [Mention specially the  
 " goods and the values in words.] " And immediately there-  
 " after, I three times offered back the goods to the said C D,  
 " or to any person for him, who would pay the said debt or  
 " the said appraised values ; but none compearing for that ef-  
 " fect, or to claim right to the said goods, or to object to their  
 " being poinded, I adjudged, decerned, and ordained the  
 " poinding to be completed, and the goods poinded to belong  
 " to the said A B, pursuer, in payment of the said debt ;  
 " which goods I allowed to be left where they were poinded.  
 " This I did in terms of the said decree in all points. A com-  
 " plete schedule of the poinding, containing an accurate list of  
 " the goods poinded and of their values, with the names and  
 " designations of the appraisers, I delivered to the said C D



" personally apprehended " [or as the case may be. See *Process*]; " which schedule was signed by me, did bear the date hereof, and contained the date of the said decree, with the names and designations of G H and J K," [design them]  
 " witnesses present at the premises, and hereto with me subscribing upon this and the preceding pages.  
 " G H, witness. " E F, *Constable*.  
 " J K, witness.

### 6. *Order for Sale.*

[Place and date.] " The sheriff, having considered the foregoing extracted decree and execution of poinding, grants warrant to the clerks of court, or any of their assistants, to sell, by public roup, as much of the poinded effects as will pay the principal sum contained in said decree, interest due thereon, and expences; and appoints intimation of the time and place of sale to be made to the defender and to the public, not sooner than eight days, nor later than twenty days from this date. The free proceeds of which sale, after deducting expences, to be paid over to the pursuer on his receipt, or the articles to be declared to belong to him, in case no person shall offer the appraised value therefor.  
 " L M."

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### POOR.

This subject cannot be passed entirely unnoticed; but a very slight sketch is sufficient.

Sheriffs, justices of the peace, and magistrates of royal boroughs, are directed to take trial how far the laws for supporting the poor have been duly executed, and to fine those who have been negligent (*a*). It is said that, under this power of control, the quarter-sessions have on some occasions interfered to get a proper fund provided for the poor, when neglected (*b*); but it is believed that instances of their doing so have been very rare.

(*a*) Proclamation of the Privy Council 31st July 1694; printed separately; and inserted in Hutcheson's J. P. 3d edit. Appendix I.

(*b*) Hutcheson's J. P. 3d edit. ii. 37.

It was at one time common for sheriffs and magistrates of royal burghs, as judges ordinary, to sustain claims by paupers against parishes for aliment, on the principle that they were merely giving effect to a civil claim against the party liable. But even at that time it was found that the heritors and kirk-session had the exclusive power of modifying the aliment in the first instance (*a*). And it has more lately been found that, whatever power sheriffs and magistrates of royal burghs may have to ordain the heritors and kirk-session to meet in order to take a claim into consideration (with regard to which the court did not give any decision; see *Addenda*), they have no jurisdiction where the heritors and kirk-session have met, and, upon consideration of the circumstances of the case, have refused parochial relief; and that application can competently be made only to the Court of Session (*b*). With regard to justices of the peace, it does not appear ever to have been considered that they had any power to control the award of the heritors and kirk-session, as they have no ordinary civil jurisdiction.

#### I. COLLECTION AND MANAGEMENT OF FUNDS.

The following are the funds for maintaining the poor of a parish.

1. The collection at the parish church.
2. Sometimes, letting out a hearse, or mortcloth; which a kirk-session may, by immemorial exclusive usage, acquire the sole right of doing (*c*).
3. Fees exacted by immemorial usage at marriages and baptisms (*d*).
4. Mortifications of lands, sums of money, or other subjects.
5. Voluntary subscription, in order to avoid an assessment.
6. If all those be deficient, an assessment on the parish; which, however, is seldom necessary; and, if it can be avoided, by voluntary subscription, or otherwise, is seldom advisable.

This assessment is imposed by the heritors, minister, and elders of each parish, who are directed to meet on the first Tuesdays of February and August, to make up a roll of the

(*a*) Paton against Adamson, 20th November 1772; Fac. Coll.; Dict. iv. 85.—Parish of Coldingham against Parish of Dunse, 28th July 1779.

(*b*) Richmond and others against the Heritors and Kirk-Session of the Abbey Church of Paisley, 29th November 1821.—Higgins against the Heritors and Kirk-Session of the Barony Parish of Glasgow, 9th July 1824.

(*c*) Turnbull against Maclaws, 10th August 1756.—Kirk-Session of Dumfries against the Squaremen, 18th February 1763.

(*d*) Kirk-Session of Dunfermline against Bayne and others, 26th June 1766.

poor of the parish, and to determine what assessment for their relief is necessary for the next half year (*a*).

The meeting is called by public proclamation, at least ten days before, in the parish church; and if the parish be extensive the meeting is generally also advertised in the newspapers (*b*). The presence of no one of the three component parts of the meeting is considered to be indispensable, so as to prevent the other two component parts from proceeding in this business (*c*). Each individual has one vote (*d*). Where a parish happens for the time not to have a minister or elders, the heritors meet and assess themselves (*e*). The meeting must raise a sum sufficient to enable the poor requiring aid to live without begging; which is prohibited (*f*). See *Vagabond*.

Half of the assessment is paid by the heritors, according to the old extent of their lands, or according to the valuation by which they last paid assessment, or otherwise, as the majority of them think best (*g*). The rule understood to be followed, where that can be done without impropriety, is the valued rent; but the real rent may be adopted where that is more conducive to equality (*h*). Proprietors of mills, and of coal and salt works, are liable to be assessed (*i*). The other half of the assessment is paid by the tenants and possessors according to their substance (*j*). The minister, as such, is not liable to be assessed (*k*).

In boroughs the assessment is imposed by the magistrates on the inhabitants, according to their substance (*l*), which is differently estimated in different boroughs (*m*). It has been found that a merchant burgess, having a counting-house, and carrying on trade in person within a burgh, is liable to be assessed as an inhabitant, for the support of the poor, although his

(*a*) 1672, c. 18.—Proclamation of the Privy Council, 11th August 1692; *ubi supra*—1695, c. 43.—1698, c. 21.

(*b*) Hutcheson's J. P. 3d edit. ii. 30.

(*c*) Hutcheson's J. P. 3d edit. ii. 35.

(*d*) *Ibid.* 34.

(*e*) Proclamation of the Privy Council, 29th August 1693, *ubi supra*—Hutcheson's J. P. 3d edit. ii. 31.

(*f*) 1679, c. 74.—1681, c. 38.—1663, c. 16.—Proclamation of the Privy Council, 11th August 1692, *ubi supra*—1695, c. 43.

(*g*) 1663, c. 16.

(*h*) Scott against Fraser, 19th January 1773.

(*i*) Parish of Inveresk against Magistrates of Musselburgh and Sir Archibald Hope, 28th May 1794.

(*j*) 1663, c. 16.—Parish of Cargill against Tasker and others, 29th Feb. 1816. The poor have no right to glean without consent of the occupier of the ground; John Wilson, 1771, Maclaurin's Criminal Cases, p. 744.

(*k*) Parish of Cargill, *supra*.

(*l*) 1570, c. 74.—1697, c. 279.

(*m*) See Laurie against Dreghorn, 2d Dec. 1797; Fac. Coll. App.

dwelling-house and constant residence be situated in another parish beyond the bounds of the burgh (*a*).

The heritors have a joint right with the kirk-session in the administration and management of all the funds belonging to the poor, and have right to be present and join with the session, it being still lawful to the kirk-session to proceed with acts of ordinary administration, although the heritors be not present (*b*): but it has been thought proper that, when acts of extraordinary administration occur, such as uplifting or lending out money, the minister should give intimation of the meeting from the pulpit ten days before it is held (*c*). Any heritor may call the kirk-session to account for their management (*d*).

The necessary expence of collecting the assessment, and a small salary to the session-clerk for keeping the books and accounts, ought to be paid from the funds (*e*). The expence of a tent for field preachings may also be paid from this fund, but no other expence, such as communion forms, tables, or table-cloths, rent for preaching field, salary to presbytery clerk, or the like (*f*).

## II. DISTRIBUTION OF FUNDS.

### 1. *By whom.*

The distribution of funds, or modification of an allowance, is generally made, at least in ordinary and incidental cases, by the minister and kirk-session; but the heritors have a joint right of distribution (*g*).

### 2. *To whom.*

*Cause of poverty.*—The persons relieved are either those who require permanent relief, whether partial or total, who are commonly called the ordinary poor, and who form the roll made up at the meetings already mentioned; or those who require only temporary relief, whether partial or total (*h*), who are commonly called the extraordinary poor, and who are not usually entered upon that roll.

*Legal parish.*—The parish primarily liable to aliment a poor person is that in which he has last resided for three years at one time (*i*); but this residence must have been industrial,

(*a*) Buchanan against Parker, 21st February 1627.

(*b*) Heritors of Humble against Kirk-Session, 15th Feb. 1751; Kirk-Poor; Falc.; Kames.

(*c*) Humble, *supra*.

(*d*) Hamilton against Kirk-Session of Cambuslang, 23d Nov. 1752.

(*e*) Hamilton, *supra*.

(*f*) Ibid.

(*g*) Humble, *supra*.

(*h*) Pollock against Darling, 17th January 1804.

(*i*) Parish of Dunse against Parish of Edrom, 5th June 1745; Kames;

that is, prior to his being supported even by private charity (*a*). It is sufficient that the residence have been as a lodger, and not as a householder. Residence as an apprentice is sufficient (*b*). A soldier cannot acquire a settlement by residence upon duty. When workmen, such as slaters, masons, &c. have their principal residence for a course of years in one place in winter, *e. g.* a town, they acquire a settlement in such place, though they may have been in the practice of going to the country every summer for work (*c*). Persons not natives of Scotland, for example natives of Ireland, acquire right to parochial relief, by three years industrial residence in a parish in Scotland (*d*).

Where a person has not acquired a settlement by residence, the parish in which he was born is liable.

In the case of vagabonds, who have never had a fixed residence any where, the place of birth is primarily liable; and if that be unknown, the parish "where they have any residence, "haunt, or most resort, for the space of three years immediately preceding their being apprehended" (*e*).

The Scots parish in which a settlement has been acquired is not liberated by the person having subsequently had such a residence in an English parish as would have given a settlement by the law of Scotland, if, from its not being for the due period, or for want of other necessary circumstances, it have not been such as gives a settlement by the law of England (*f*).

A married woman's settlement is in her husband's parish. And accordingly it has been found that a Scotswoman, the wife of an Englishman, by whom she was deserted, could not during his life obtain for herself and her children a residence in a parish in Scotland, so as to entitle them to permanent alimment from its funds, though the parish was that of her settlement before the marriage (*g*).

A widow's settlement is in her husband's parish, unless she have, subsequently to his death, acquired a settlement elsewhere, by three years industrial residence.

**Kilk. Poor; Falc.**—Parish of Crailing against Parish of Roxburgh, 7th March 1767; **Kames; Fac.**—Parish of Hutton against Parish of Coldstream, 6th December 1770.—**Waddel** against Parish of Hutton, 14th June 1781.

(*a*) **Runciman** against Parish of Mordington, 24th January 1784.

(*b*) **Heritors of Cockburnspath**, 9th June 1809.

(*c*) **Parish of Dalmellington** against Town of Irvine, 3d December 1800.

(*d*) **Higgins** against the Heritors and Kirk Session of the Barony Parish of Glasgow, 9th July 1824.

(*e*) 1663, c. 16.—**Kilkerran**, p. 406.

(*f*) **Brown** against Kirk-Session of Mordington, 4th March 1806.

(*g*) **Penniculek** against Duddingston and Edinburgh, 3d March 1813.

A child, being considered as part of the family, must be maintained by the legal parish of its parents, though not that of its own birth or residence (*a*). A natural child must be supported by the mother's parish, if the father be unable to maintain it, not by the father's (*b*). (See *Children*, sect. Aliment of Illegitimate.) If the parish of the parents of a child be unknown, the parish of its birth is liable.

Poor persons almost always reside in the parish which alimments them; and that parish is entitled to insist upon their doing so, in order that the members of the kirk-session may have constant opportunities of knowing their circumstances and conduct.

It is sometimes necessary to afford temporary relief to persons who have not acquired a right to a permanent allowance from the funds of the parish; for they cannot be allowed to starve (*c*). And in practice, persons having had such a residence in a parish as distinguishes them from mere vagrants are relieved till their legal parish be ascertained (*d*). And even passing poor receive a small temporary relief in case of absolute necessity, and while they are unable to proceed, but in such a manner as not to afford any encouragement to vagrancy. In like manner, children exposed are taken care of by the parish in which they are exposed, till their legal parish be ascertained (*e*). Thus also, where a person dies or is found dead, his body is interred by the parish. Upon the same principles, apparently, the parish in which a lunatic had been apprehended was found liable, in the first instance, in his maintenance in the bedlam of Edinburgh, to which he had been sent by the sheriff of the county of Edinburgh, on an application by the procurator-fiscal, although the pauper had not been born in that parish, nor, so far as appeared, chiefly haunted that parish; power being reserved to the parish to maintain the lunatic at a cheaper rate, if kept in safe custody, to the satisfaction of the sheriff (*f*). In cases of temporary

(*a*) Heritors and Kirk-Session of Coldingham against Heritors and Kirk-Session of Dunse, 28th July 1779.—Buik, Howie, and others, against Kirk-Session of Arbroath, 25th January 1800.

(*b*) Parish of Rescobie against Parishes of Aberlemno, Dunnichen, and Forfar, 28th November 1801.—Parish of Gladsmuir against Parishes of Preston and Salton, 11th June 1806.—Parish of Edinburgh against Brown, 11th June 1806. (*c*) Pennicuik, *supra*.

(*d*) See Buik and Kirk-Session of Alyth against Parish of Arbroath, 25th January 1800.—Brown against Kirk-Session of Mordington, 4th March 1806.

(*e*) Rescobie against Aberlemno, &c. 28th November 1801.—Gladsmuir against Preston, 11th June 1806.

(*f*) Scott against the Reverend John Thomson, 13th November 1814.

relief afforded, or expence incurred by a parish different from the legal parish, the former has a claim for relief against the latter; which, however, may sometimes not be carried farther back than intimation of the claim or citation, to the action for relief (a).

It is competent to the managers of the poor's funds of a parish to sue, before the judge ordinary, a pauper's relations liable in aliment, not merely for payment of sums already advanced, but for relief of the burden of future aliment (b). When illegitimate children become chargeable upon the mother's parish, that parish often raises an action for repayment and relief against the putative father, if it be thought that any thing can be recovered from him.

See *Vagabonds*.

## PREScription.

PREScription, questions with regard to which may occur before justices in the exercise of their civil jurisdiction, is the loss of a right, by the proprietor's neglecting to exercise it during a certain period.

### I. KINDS OF PREScription.

The law has appointed different periods of prescription in different cases. It can hardly happen that any of the longer prescriptions should occur before justices. It is sufficient, therefore, merely to mention them, adverting chiefly to the shorter prescriptions.

#### *Forty years.*

By the prescription of 40 years, all rights are lost, whether simple obligations, mutual contracts, or actions concerning moveables, though grounded on rights of property (c). It

(a) Bulk and Kirk-Session of Alyth against Parish of Arbroath, 25th January 1800.—Rescobie against Aberlemno, &c. 28th November 1801.—Brown against Kirk-Session of Mordington, 4th March 1806.—Gladsmuir against Preston, 11th June 1806.

(b) Heritors and Kirk-Session of Ettrick against Sword, 14th February 1824.

(c) Erskine, iii. 7. 8.—1469, c. 29.—1474, c. 55.

is founded upon the principle that, by so long a silence, the creditor has abandoned his claim ; so that no plea, which does not prevent the application of this principle, can avail him ; for instance, an admission by the debtor that the debt is unpaid is not sufficient for the creditor (*a*). This prescription does not run against minors.

*Twenty years.*

Holograph writings, that is, obligations in the hand-writing of the debtor, for example, holograph bonds, not attested by witnesses, holograph missives, or books of accounts, &c. prescribe in 20 years. This prescription is founded on a presumption that the writing is forged. The pursuer may refer to the debtor's oath after 20 years, that the subscription is genuine, and that the deed is holograph ; and the debtor, admitting those, must prove that the debt was paid, as if the obligation had been in the most regular form. No proof that the deed is holograph, and the subscription genuine, is admissible after 20 years, except the debtor's oath (*b*). This prescription runs from the date of the writing. It does not run against minors (*c*).

*Seven years.*

No person binding conjunctly and severally with or for another, in any bond or contract for a sum of money, is bound longer than seven years after the date of the obligation ; and whoever is bound for another, either expressly as cautioner or as co-principal, has the benefit of this prescription, provided he has either a clause of total relief in the bond itself, or a separate bond of relief intimated to the creditor at receiving his bond (*d*). It does not extend to co-principals having an obligation of mutual relief in the bond (*e*). It only reaches cautioners in obligations for payment of money, not *ad factum præstandum*, for the due performance of an office, or the like (*f*). The obligation expires, *eo ipso*, at the end of the seven years, unless it have been sufficiently interrupted, *i. e.* by diligence, or probably by decree, or possibly by action ; and though it have been perpetuated by interruption, still no more than the principal and seven years interest can be demanded (*g*).

(*a*) Erskine, iii. 7. 15.

(*b*) 1699, c. 9.—Erskine, iii. 7. 26.

(*c*) 1699, c. 9.

(*d*) 1695, c. 5.

(*e*) Creditors of Park against Maxwell, 16th February 1785.

(*f*) Erskine, iii. 7. 23.

(*g*) 1695, c. 5.—Douglas, Heron, and Company, against Riddick, 1st March 1793.—Reid against Maxwell, 17th February 1780.—Bell's Com. 4th edit. i. 274.



For the septennial prescription of citations to interrupt prescription, see sect. Interruptions.

*Six years.*

Bills of exchange and promissory notes (bank notes and post bills excepted) prescribe in six years, in which the years of minority are not computed; but the subsistence of the debt may be proved by writ executed, or oath emitted, by the debtor, after the six years (*a*). The six years run from the time when payment is "exigible;" which is the term of payment where that is definite, and is the date in the case of a bill payable to the drawer on demand (*b*). Prescription runs, not from the term of payment named, but from the last day of grace (*c*). (See *Bills*.)

*Five years.*

The arrears of rent prescribe, if they be not pursued for within five years after the tenant's removal from the lands for which the arrears are due (*d*); and equally whether the tack be verbal or in writing (*e*). It only applies to tenants, natural possessors of the ground, on account of their ignorance of business (*f*).

Multures, or debts due for the manufacturing of corn, prescribe in five years after they become due (*g*).

Ministers stipends prescribe in five years after they become due (*h*). Even vacant stipends fall under this prescription (*i*).

All single transactions or bargains concerning moveables, or sums of money, which the law allows to be proved by witnesses, prescribe in five years after making the bargain (*j*). Under this description are comprehended sales, locations, and other consensual contracts, to the constitution of which writing is not necessary; for they may be proved by witnesses (*k*). It has been found, for example, to apply to the price of a cow (*l*).

The quinquennial prescriptions before mentioned do not apply where there is a written voucher of the debt. The debts falling under them may be proved after five years, by

(*a*) 12 Geo. III. c. 27, sect. 37, 38, 39, 40, made perpetual by 23 Geo. III. c. 18, sect. 55.

(*b*) Stephenson against Stephenson's Trustees, 16th June 1807.

(*c*) Douglas, Heron, and Company, against Trustees of Grant, 19th November 1793. This point affirmed on appeal, 11th November 1796.

(*d*) 1669, c. 9.

Dict. ii. 117.

(*h*) Ibid.

(*k*) Erskine, iii. 7. 20.

(*e*) Nisbet against Baikie, 10th July 1739;

(*f*) Erskine, iii. 7. 20.

(*i*) Erskine, iii. 7. 20.

(*l*) Nobles against Armstrong, 11 June 1813.

(*g*) 1669, c. 9.

(*j*) 1669, c. 9.

the writ or oath of the debtor, to be still subsisting (*a*). They proceed upon the presumption that the debt has been paid.

Arrestments, whether proceeding on decrees, registered obligations, or depending actions, prescribe in five years (*b*). Where the arrestment is used on a decree or a registered bond or contract, the years are computed from the date of the arrestment; where it is used on a depending action, they are computed from the date of the decree by which the debt is constituted (*c*).

It is almost unnecessary to notice the prescription of *actions when brought*, as it is very unlikely to occur in a justice of peace court. When an action is once competently brought, it naturally subsists for 40 years, so as to admit of being awakened, though it have been asleep (*d*) for any time short of that period; but it is provided that actions for ministers' stipends, multures, rents by tenants, bargains concerning moveables or sums of money, which may be proved by witnesses, and actions upon spuilzies, ejections, or arrestments, prescribe every five years (*e*).

None of the kinds of quinquennial prescription run against minors (*f*).

#### *Three years.*

Actions of spuilzie suffer a triennial prescription (*g*). The prescription, however, applies only to the violent profits, and the mode of proof by the party's oath *in litem*. It is competent at any time within 40 years to bring action for restitution of the goods and ordinary damages upon ordinary proof (*h*). The same prescription also extends to "others of that sort," that is, all suits grounded upon acts of violence or wrong committed by the defender, where the pursuer is entitled to a proof of damages by his own oath *in litem* (*i*). This prescription in such cases does not run against minors (*j*).

A triennial prescription is established in "all actions of debt, for house-mails, mennis ordinars, servants' fees, merchants' comptes, and uther the like debts that are not founded upon written obligations" (*k*). These require a few observations.

(*a*) 1669, c. 9—Erskine, iii. 7. 20.

(*b*) 1669, c. 9.

(*c*) Erskine, iii. 7. 20.

(*d*) A depending action, in which no step has been taken for a year, is said to sleep, and cannot be farther insisted in till it be awakened by a summons for that purpose, or by consent.

(*e*) 1669, c. 9—1685, c. 14—Erskine, iii. 7. 27.

(*f*) 1669, c. 9.

(*g*) 1579, c. 81.

(*h*) Erskine, iii. 7. 16.

(*i*) Ibid.

(*j*) 1579, c. 81.

(*k*) 1579, c. 83.

House rents prescribe from year to year, though the tenant continue in possession (*a*).

By "men's ordinaries" are meant debts due for the entertainment of persons at board. Under the general clause of "the like debts," alimentary debts are subjected to a triennial prescription (*b*). But this prescription does not apply to the mother of an illegitimate child or her representatives pursuing the putative father or his representatives for its aliment (*c*), this not being an obligation arising from contract. There is no doubt that, if either of the parents have boarded the child with a third party, in a question with such third party, the triennial prescription does apply. Each year's debt runs a separate course of prescription (*d*).

In servants' wages every year runs a separate prescription (*e*). The act is by practice extended also to debts due to artificers or tradesmen for their work (*f*).

This prescription applies not only to proper merchants' accounts, but by practice to the accounts of writers, agents, procurators, &c. Practice has made a distinction, authorized indeed by the statute, between the account itself and any other particulars not properly belonging to it, which are comprehended in it (*g*). In accounts, prescription runs not for each article separately, but only from the last article; and the furnishing of a new article within three years prevents the prescription from applying (*h*). It has been found, however, that the prescription of an account of furnishings to a person deceased, is not prevented by a continuation of furnishings to his heir (*i*). In order to have the effect of preventing the prescription from applying, such furnishing within the three years must be by the pursuer. It will not have the same effect if made by the defender (*j*).

Under the expression in the act of "the like debts," this prescription is applied to all debts of the same general description with those enumerated. But it does not apply to single transactions or separate dealings, though the quinquennial may ;

(*a*) Ferguson against Muir, 14th January 1737; Dict. ii. 121.

(*b*) Erskine, iii. 7. 17.

(*c*) Paterson against Cochrane, 14th February 1758.—M'Dowall against M'Lurg, 19th February 1807.—Finlayson against Gown, 7th July 1809.

(*d*) Erskine, iii. 7. 17.

(*e*) Ross against Master of Salton, 12th February 1680; Stair.—Douglas against Duke of Argyle, 22d July 1736; C. Home.

(*f*) Erskine, iii. 7. 17.

(*g*) Ibid.

(*h*) Ibid.

(*i*) Kennedy against Macdowal, 23d June 1741; Kilk. Prescription, No. 8.

(*j*) Ramage against Charteris, 19th July 1782.

nor to claims of damages, indemnification and recompence, mandate (*a*), *negotiorum gestio* (*b*), or the like.

The debts mentioned in this statute (1579, c. 83) may, even after the three years, be proved by the oath of the debtor, or by any writing signed by him (*c*), so as to overcome the presumption of payment within the three years. After the three years, if the creditor refer to the debtor's oath, he must prove by it not only the constitution, but the subsistence of the debt (*d*). Where reference is made to the oath of the heir of the original debtor, he will be assoilzied on swearing that he does not know whether the debt is due or not, for this does not prove the debt against him : but where reference is made to the oath of the original debtor himself, he must state distinctly the circumstances of the payment, at least in those situations where it may reasonably be expected that he should remember the circumstances, otherwise he will be subjected. The pursuer will be allowed in his reference to pass over the original debtor, and to betake himself to the oath of such person of his household or establishment as has best access to know the fact ; for instance, the wife, in the case of furnishings for the family, especially where she is alleged to have ordered the articles (*e*). Proof by writ must also extend to the subsistence as well as to the constitution of the debt. The writing must be an obligation for, or acknowledgment of, the debt, such as the debtor would think of withdrawing upon payment, or of taking a written receipt to secure himself against. For example, it is not sufficient that the pursuer produce a written mandate by the debtor for the goods (*f*), or that he produce the carrier's receipt for the goods having been actually forwarded to the debtor ; for this does not remove the presumption of payment within the three years (*g*). But an account holograph of the debtor stating the debt as due, has been held sufficient (*h*). If the writing be of the proper description, it is of no consequence whether it be dated before or after the three years. Writings, though not strictly probative, are sometimes held sufficient proof in this question. Thus a book of accounts regularly kept by the debtor, in which he has charged himself with the particu-

(*a*) Sadler against M'Lean, 18th November 1794.—Hamilton against Martin, 24th January 1795.—Freer against Paterson, 27th Jan. 1826.

(*b*) Butchart against Moodie, 13th June 1781.

(*c*) 1579, c. 83.

(*d*) Erskine, iii. 7. 18.

(*e*) Paterson against Taylor, 23d January 1771.—Young and Trotter against Playfair, 2d December 1802.

(*f*) Ross against Shaw, 19th November 1784.

(*g*) Douglas against Grierson, 18th November 1794.

(*h*) Donaldson against Murray, 15th January 1766.

lar debt in question, will fix that debt effectually against him, though it would not be received as evidence in his favour (*a*). But the books of the creditor or of the furnisher of the goods, however fair and regular, make no evidence, after elapsing of the three years, that the debt is due, though joined to the clearest proof by witnesses (*b*).

The shorter prescriptions in general run against minors, unless where they are specially excepted (*c*) : which they are not in those triennial prescriptions.

## II. GENERAL OBSERVATIONS.

Prescription runs *de momento in momentum*. 1. Every point of time is computed, not only *tempus utile*, the days of which one can avail one's self by prosecuting one's claim in court, or using legal interruptions, but *tempus continuum*, holidays, in which no judicial proceeding can be carried on. 2. The years of prescription must be fully completed before any right can be lost by it ; so that interruption made on the last day of the time will break the course of the prescription (*d*).

Prescription runs equally against churchmen, overseers of hospitals, corporations, and the like, as against individuals (*e*).

Prescription begins to run only from the time when the debt or right can be demanded in judgment, or sued upon. Thus prescription runs upon a bond, not from its date, but from the term of payment (*f*).

Exceptions or defences competent to a defender for eliding an action, are lost by prescription, if they be founded upon some claim of the defender, which is of its own nature productive of an action, as compensation : but not if they tend merely to exempt from a demand by another, as a discharge or a receipt (*g*).

The defender may lose the benefit of any of the shorter prescriptions, by bringing forward formally and deliberately, by a regular condescendence, defences inconsistent with the principles upon which they severally proceed ; for instance, he may lose the benefit of the vicennial prescription of holograph deeds, by pleading payment, for that is an admission of the genuineness of the obligation ; or of the sexennial prescription of bills, by pleading forgery, for that is an admission that he has not paid.

(*a*) Erakine, III. 7. 13.

(*d*) Ibid. 30.

(*e*) Ibid. 32.

(*b*) Ibid.

(*f*) Ibid. 36.

(*c*) Ibid. 16.

(*g*) Ibid. 11.

## III. INTERRUPTIONS.

Interruptions are steps taken by the creditor against the debtor within the period of prescription, for preserving the debt from prescription (*a*). Prescription is interrupted, 1. By any declaration signed by the debtor, acknowledging the debt, or by a missive, promising payment. 2. By citation or action (not raising a summons merely) at the instance of the creditor against the debtor, or by any judicial demand; but no extra-judicial demand is sufficient, unless it be accompanied with some acknowledgement of the debt by the debtor (*b*); and the statutes seem to require that such acknowledgement be in writing. 3. By any diligence used on the debt, as arrestment, pouncing, &c. The citation or diligence must be special as to the particular debt (*c*). 4. By partial payments in the case of the long prescription, which proceeds on a presumed dereliction; but partial payments strengthen the shorter prescriptions, which proceed on a presumption of payment (*d*). 5. By a submission applicable to the claim (*e*).

All citations used to interrupt prescription, whether long or short, must be renewed every seventh year, otherwise they prescribe. This prescription does not run against minors (*f*). If upon citation any judicial act shall follow, it subsists as an action for 40 years. Interruptions by diligence subsist for 40 years (*g*).

The effect of interruption is to make the prescription run a new course, from the date of the interruption. Minority is not properly an interruption; the years of minority are merely discounted from the prescription, any time which may have run before minority being computed (*h*).

In an obligation in which the right of the creditor is unlimited, extending equally against all the obligants whom it affects, if the right itself be saved from prescription, the whole of it is preserved. Thus diligence against one of two or more co-principals preserves the debt against all of them: diligence against a cautioner preserves the debt against the principal debtor: and diligence against the principal preserves the debt against the cautioner; but, as already said, in treating of septennial prescription, it does not preserve the debt against the cautioner for more than the principal and seven years interest (*i*).

(*a*) Erskine, iii. 7. 38.

(*d*) Ibid. 39.

(*f*) 1669, c. 10.

(*i*) Ibid. 46.

(*b*) Ibid. 39.

(*e*) Vans against Murray, 14th June 1816.

(*g*) Erskine, iii. 7. 43.

(*c*) Ibid. 38.

(*h*) Ibid. 45.

Where the right of the creditor is divided into distinct parts, either originally or by voluntary conveyance from the first creditor, it may happen that part of the right prescribes, while part does not; thus, where part of a debt is assigned, interruption used by the assignee will not save from prescription the part still in the person of the cedent (*a*).

Interruptions being favourable have frequently been sustained upon citations, decrees, vouchers, and diligences, though not in every respect formal and regular; but a considerable informality is fatal (*b*).

For prescription of prosecutions against justices, &c. see *Justices*, last note.

## PRISON BREAKING.

THIS is punished as an offence against justice, by breaking a state of lawful custody. It may be committed by any prisoner, whether for a civil or for a criminal cause; and by any means of escape, even by walking out when the jail is opened by a mob. The man must have been lawfully a prisoner; the warrant must have been granted by competent authority against the party, and *ex facie* regularly. Even the breach of unlawful imprisonment, if done with outrage, especially by a mob from without, is punishable. To make the act breaking prison; it must be from a proper, public, and established jail; escape from more temporary and occasional places of custody may be a crime, especially if accomplished by violence, or attended with tumult, but is not breaking prison (*c*).

The punishment is arbitrary: it may, in an aggravated case, be very severe; for instance, if accompanied with great violence to the person of the jailor, or, still more, if accomplished by an assault of an outrageous multitude from without. It is usually a renewal of confinement (*d*). The capital offence of fire-raising is committed by burning any part of a jail (*e*).

Justices may recommit a person who has broken prison;

(*a*) Erskine, iii. 7. 47.

(*b*) Ibid. 40.—Earl of Hopetoun against York Buildings Company, 21st July 1784, affirmed on appeal, 21st March 1785.—Sir James Grant against York Buildings Company, 21st July 1784, as reversed on appeal 15th April 1785.—Baillie against Doig, 2d March 1790.

(*c*) Hume, i. 396-8.

(*d*) Ibid. 398.

(*e*) Ibid.

and may probably inflict a slight punishment, *e. g.* a short prolongation of the imprisonment, where the original imprisonment was inflicted by themselves for a petty delict, and where there is no aggravation in the prison-breaking. Where the imprisonment, though for a petty offence, was inflicted by the Judge Ordinary, it seems best for justices (after recommitting) to leave the punishment to him. In an aggravated case, they may recommit, and prepare the case for a court of higher powers. See *Arrest, &c.*

### PRISONERS OF WAR.

THE assisting of prisoners of war to escape is punishable arbitrarily at common law (*a*).

The following provisions have been made by statute. Any person who assists any prisoner of war, whether confined or on parole, to escape from his place of confinement, if confined, or from the King's dominions, if upon parole, may be transported for life, or for 14 or 7 years (*b*). Any person aiding any prisoner on parole to quit any part of the King's dominions where he is upon parole, though he should not aid such person in quitting the coast, is guilty of aiding the escape of such person under this act (*c*). The guilt is incurred though the prisoner, who has gone out of the bounds over which his parole extends, should be prevented, by arrest or otherwise, from making an effectual escape out of the country (*d*). Any person owing allegiance to the King, who, upon the high seas, assists any prisoner in effecting his escape, is liable to the same punishment; and if the offence was not committed within the body of a county, it may be tried in any county within the realm (*e*). Offences may be tried otherwise than under this act; but no person can be prosecuted both under this act and otherwise (*f*).

Justices of the peace of course cannot *try* for this crime; but they may arrest and precognosce those guilty of it (see *Arrest, &c.*). They and all subjects ought to endeavour to secure any prisoners of war who have escaped from confinement, or are beyond the limits prescribed by their parole.

(*a*) Hume, l. 519-520.

(*c*) Sect. 2.

(*e*) 52 Geo. III. c. 156, sect. 3.

(*b*) 52 Geo. III. c. 156, sect. 1.

(*d*) Hume, l. 520.

(*f*) Sect. 4.



## PROCESS.

THE mode in which an ordinary case may be conducted before justices of the peace is to be noticed here. Specialties introduced in particular cases are noticed under those cases. The procedure, however, before justices differs in almost every county.

Parties are allowed to employ procurators to conduct their causes before the justices, whether criminal or civil, and whether they be pursuers or defenders (*a*). The procurators who commonly act are those of the sheriff and other courts. Regularly, however, they ought to be admitted by the justices. Advocates, who may act in any court, sometimes plead before the justices. See *Mandate*, sect. Advocate and Procurator.—*Oaths*.

## I. IN CRIMINAL CASES.

1. *Complaint*.

A criminal prosecution before the justices commences with a libel, complaint, or summary petition, by the procurator-fiscal, or the party injured (see *Parties*, sect. Criminal).

Before the supreme Criminal Court the complaint is invariably in a syllogistic form, that albeit murder is a heinous crime, and severely punishable, &c. yet the accused has been guilty of that crime, in so far as, &c. stating the particulars, and therefore ought to be punished. It is usually in the same form in trials of importance before the judge ordinary. Before justices of the peace, it is generally in a more simple form, stating little more than the particulars of the offence. And some have thought that, where the charge is of such a nature as to render a formal syllogistic complaint advisable, the case ought to be devolved on a court of more extensive powers.

The complaint must not be materially wrong in the name or designation of the accused, or give a general or equivocal description of him, as John for James, weaver for shoemaker, or residing in Edinburgh, instead of Leith. If he have studiously taken a false name or designation, these will be held sufficient against him. Where he has passed by various names, as many of them should be used as can be learned (*b*).

The complaint must relate the fact specially, in such a

(*a*) L. Fullarton against Earl of Kilmarnock, 19th November 1714; Dalr.

(*b*) See Hume, ii. 152-6.

manner as may distinguish the particular act from other instances of the same crime (*a*). 1. The manner of the criminal act must be related in a reasonable and sufficient way; but there is no need of a minute detail (*b*). 2. The person injured must in many cases be specified. This is required in all prosecutions by a private party, in order to shew that he has an interest; and seems to be required, not only in crimes directly against the person, but in those which have any relation to the person. In crimes against property, *e. g.* theft, though it is usual to specify the owner, it seems sufficient to describe the lawful possessor, whether the owner, or another for him, from whom the goods have been taken (*c*). 3. Goods stolen, &c. must be described in a reasonable way, as to their kind, and their quantity, or value; *e. g.* in the theft of money, the sum or thereby, and the species of money generally must be mentioned; but it is not necessary to describe notes, or even to say how much was in notes, and how much in coin (*d*). 4. The complaint must, when possible, mention the place and time of the crime charged (*e*). It must be positive and explicit as to the *place*, describing it in such a reasonable way as sufficiently to distinguish it from others (*f*). In a generic charge on reiterable acts, relating to the character or course of life of the accused, as being a vagabond, or habite and repute a thief, specification of the district, county, or neighbourhood, is sufficient as to such general character or course of life (*g*). Where the accused offers a proof of *alibi* (that he was elsewhere) the prosecutor must bring a special and conclusive proof of the time and place of the deed (*h*). With regard to the *time*, it is the practice in the Court of Justiciary, on account of the uncertain memory of witnesses, to extend the charge to three months; the deed being laid as done, for instance, on the 10th day of July 1815, or one or other of the days of that month, or of June immediately preceding, or of August immediately following (*i*). It is understood that the same latitude is usually taken in inferior courts; sometimes, in the case of recent offences, only one month. If the defence of the accused be independent of the particular time, the prosecutor need only prove the fact within the time libelled; but if it be a plea of *alibi* as to part of the time libelled, June for instance, the prosecutor must endeavour to prove the fact in one of the other two months; otherwise it must be presumed to have taken

(*a*) Hume, ii. 181-4.

(*c*) Ibid. 191-6.

(*f*) Ibid. 203-7.

(*i*) Ibid. 213-4.

(*d*) Ibid. 196-200.

(*g*) Ibid. 207-213.

(*b*) Ibid. 184-191.

(*e*) Ibid. 200-3.

(*h*) Ibid. 213.

place in the month to which the *alibi* applies, and the proof of the fact and that of the *alibi* are to be weighed against each other (*a*). A latitude as to time is allowed where strictness could not be observed without inconvenience and risk of preventing justice. Thus, a complaint for reset of theft need only specify the time of the theft, and of the discovery of the goods in the possession of the accused, without the time when they first came into his hands (*b*). The rule of setting forth time and place does not extend to the circumstances and presumptions to be given in evidence, or prevent the proof of such circumstances, though they did not happen within the period libelled (*c*).

It is common, and seems proper, where the complaint is in the simpler form usually employed before justices (and is the uniform practice in a syllogistic complaint), to charge the accused as guilty *art and part* of the offence. This includes not only accession before or after the fact, but interference at perpetrating it, rendering the person truly a principal. It obtains conviction of the accused as an accessory, though believed by the prosecutor to have been a principal: it allows proof by facts and circumstances, though different from those in the complaint: it frees from the necessity of detailing the circumstances: and it secures against variations of the proof from the complaint, as to the manner of the deed, which do not alter the fundamental charge (*d*).

The complaint is signed by the prosecutor, and sometimes it is signed also by the clerk.

A list of the names and designations of the prosecutor's witnesses, signed by him, is subjoined to the complaint. This is necessary in the case of all the more grave offences, and seems to be necessary, or, at least, proper, in all cases where the offence is of its own nature a crime, and not a mere breach of some statutory regulation enforced by a penalty (*e*).

(*a*) Hume, ii. 214.

(*b*) *Ibid.* 215.

(*c*) *Ibid.* 218.

(*d*) *Ibid.* 218-283.

(*e*) See Hume, ii. 500.—Mackenzie against Gibb and others, 19th July 1817, Books of adjournal.—Erskine against Worsely, 14th December 1818, *Ibid.* which was a petition and complaint for an assault, and the want of the list of witnesses was one of the grounds of reversal.—Fergusson against Procurator-Fiscal of Edinburgh, 21st June 1819, *Ibid.* where the Court of Justiciary advocated certain proceedings before the Sheriff of Edinburgh, for resetting a stolen ring, and sustained the objection of the want of a list of witnesses, "as it is necessary, both for the due information of the accused and the regularity of criminal procedure, that summary complaints in criminal cases, concluding for the pains of law, on charges exhibited nearly in the usual form and style of indictments, should, from the first service on the accused, have a full list of witnesses annexed thereto."

### 2. *Procedure on complaint. (a).*

It may be proper to premise that, where the offence is not of a very petty nature, or where there is reason to suppose that the criminal may make his escape if he have an opportunity, he is usually arrested for examination, examined, and laid under bail for his appearance, before the complaint is prepared. (See *Arrest, &c.—Commitment for trial.—Bail.*) By this course the prosecutor has the benefit of his declaration as an article of evidence, and obtains security for his appearance. Sometimes in petty cases the accused is arrested or cited for examination, not as a preliminary proceeding, but upon the complaint itself as the first step of process. But it appears more desirable, where examination is proper, that it should take place before the complaint is presented, and should be referred to in it. It appears that such examinations cannot take place, even in petty criminal cases, under the certification of being held as confessed, as is done in civil cases, but that the defender is at liberty not to answer, as where the examination precedes the presentment of the complaint. Such examinations must be taken by the justices personally.

There is seldom occasion to take a formal precognition of witnesses in cases to be prosecuted before justices. The prosecutor merely inquires what they know of the matter in question before he cites them, and takes a memorandum of it.

When a complaint has been presented in the case of acts truly of a criminal nature, *e. g.* theft, violent assaults, &c. or where the accused is in custody, or where it appears, upon any other ground, to the justice to whom the complaint is presented, that it is advisable to dispose of the case at once, a deliverance is given, granting warrant to constables for serving the accused with a copy of the complaint and of the list of witnesses, and for citing him to appear personally at a certain time and place, to answer to the charge, and for citing witnesses for both parties, for the same time and place. (For the manner of doing which, see the *Duty of a Constable*, and the forms annexed to this article.)

If the pursuer fail to appear at the diet, or to insist, and the defender appear, the justices dismiss the complaint, and, if proper in the circumstances, award expences.

If the defender fail to appear, warrant is granted for apprehending him, and for committing him, till he find bail to ap-

(a) For the procedure before Sheriffs in aggravated cases, see Hume, ii. 28, *seq.*

pear at all diets of court ; and, in addition, if he have found bail to appear at calling the cause, it is declared forfeited, and is levied from the cautioner by the prosecutor. In certain petty offences, as noticed under those offences, the justices are, by special statute, authorised to hold the defender not appearing as confessed. (*See Breach of the Peace, &c.*)

On the parties both appearing, the same course is followed as in other criminal courts in this country proceeding without a jury. The complaint is read. If there be any objection to the citation, on the ground of any discrepancy between the copy served and the record, or otherwise, or any other preliminary objection, it is disposed of. The defender is asked whether he have any objection to the relevancy of the complaint ; and if any such objection be stated by him, or occur to the court, it is disposed of. If the complaint be relevant, and whether an objection to it have been stated or not, an interlocutor is pronounced, finding it to be relevant, and allowing a proof. The defender is then asked by the court whether he is guilty or not guilty. If he plead guilty, judgment is pronounced, ordering a certain punishment. If he plead not guilty, the nature of his defence is stated, so that, if it be not a mere denial of the libel, the complainer may have it in view in leading his proof. The proof for the complainer is then led, including the reading of the previous declarations of the defender, if he emitted such. The proof for the defender, if he have any, is then led. If the complainer wish to make any observations upon the proof, they are then made verbally. And the defender may make such observations verbally as may occur to him in answer to the observations for the complainer, and upon his own proof, if he led such. Upon advising all of which, judgment is pronounced.

If the case be delayed, on being brought into court the defender may, if necessary, be laid under bail to appear at all diets of court.

In very petty cases, particularly offences created by statute, *e. g.* shooting without qualification, fishing in forbidden time, &c. a deliverance is usually given for serving the complaint upon the accused, and for his giving in written answers to it, within a short specified time. Sometimes also replies are ordered, when the answers seem to require it. Those and all pleadings ought to be signed by the party or his procurator. If the defender do not admit his guilt, the justices allow a proof on a certain day, and, on advising the proof, pronounce judgment.

Whichever of those courses be followed, a competent time,

according to the circumstances of the case, ought to be allowed to the accused, for his defences (*a*), e. g. 48 hours, 4 days, 8 days, &c. And during the proceedings, a reasonable application, by the accused, for delay, is not refused.

In the commencement of the proceedings, that is, upon the defender being brought before the judge, where that course is followed, or in his answers, where that course is followed, he must offer any objections which he may have to the *relevancy* of the charge; that is, that the facts as stated in the complaint do not amount to a crime, or to the crime charged, or that they are not stated with sufficient precision, &c. It is the duty of the judge himself to attend to the relevancy; and, if he observe the irrelevancy, when the complaint is first presented to him, he ought to dismiss it at once, without even calling the defender. If the charge be dismissed as irrelevant, the prosecutor may bring another in better form, unless the accused have run his letters, and the time have expired. (See *Liberation*.) There ought to be an express finding of the relevancy of the charge in the interlocutor allowing the proof to proceed.

The parties give a note of the witnesses whom they wish cited to the constable, who ought to cite them on reasonable notice. Neither in criminal nor in civil cases can a witness be cited beyond the jurisdiction of the judge granting the warrant of citation; nor can a witness, living within the jurisdiction of a judge, be compelled by him to go into another jurisdiction, to bear evidence. If the witness be necessary, application must be made to the Supreme Court to interpose their authority. If the witness (whether in a criminal or in a civil case) do not appear on the day appointed, a second warrant or diligence is granted, containing a command to the officer to apprehend him and bring him before the court (*b*). The expence of witnesses must be defrayed by those adducing them, which the court modifies so as to cover the reasonable expences incurred by them. If they render a second diligence necessary, they must defray their own charges. (See *Proof*:—*Arrest*, &c. sect. In another part of united kingdom.)

In criminal cases, the proof ought to be taken in presence of the court and of the accused (*c*).

(*a*) *L. Fullarton against Earl of Kilmarnock*, 19th Nov. 1714; *Dalr.*

(*b*) *Erskine*, iv. 2. 30.

(*c*) *M'Allister and others against Procurator-Fiscal of Lanarkshire*, 22d June 1812, in Court of Justiciary; *Fac. Coll.* where the accused were in absence tried, and sentenced to imprisonment and fine, at common law, for combination and mobbing. Suspension, liberation, and interdict, *Fergus-*

The proof is taken in writing, in cases in which the judgment of the justices may be reviewed; not usually in other cases.

The proceedings, after the complaint, and answers (if answers have been ordered), are usually *viva voce*. Where a point of law occurs, the court may sometimes desire to see it discussed in writing; but, in general, long-written pleadings ought to be discouraged (*a*). In particular, no written discussion on the proof taken ought, in the ordinary case, to be allowed. A paper cannot be received, unless previously ordered by the court: nor should it be considered by the justices, unless lodged with the clerk and marked by him.

When the proof and discussions are concluded, the justices, either at the time, or after making *avizandum*, where the case requires time for consideration, pronounce a judgment acquitting the accused or ordering a certain punishment. When the punishment is a fine, the judgment commonly authorises imprisonment till payment. When it is a pecuniary penalty under a statute, not pointing out a particular course, *e. g.* shooting without qualification, fishing in forbidden time, &c. the judgment commonly directs the penalty to be levied by poinding and arrestment.

The expences of a criminal prosecution are usually awarded against a private prosecutor whose complaint is dismissed, where the court think the prosecution malicious (*b*); and sometimes, in unfavourable cases, they are awarded against the procurator-fiscal giving his instance (*c*). They are usually awarded against the accused fined at the instance of a private prosecutor (*d*); and in some inferior courts at the instance of the procurator-fiscal (*e*): and a course often followed is understood to be to award a slump sum for fine and expences, and to imprison till payment of that sum (*f*). When the expences cannot conveniently be modified in the judgment, they are found due generally, and an account ordered to be given in, which is modified and decerned for by a subsequent interlocutor.

son and others against Murdoch, 6th August 1815, Justiciary Records; where certain persons having been fined, under a local road act for Ayrshire, 45 Geo. III. c. 28, sect. 47; and some of them having had their goods advertised for sale under a poinding; and others, who had not goods, having, under the act, been imprisoned to compel payment; the Court suspended the proceedings, principally on the ground that those persons were absent, both when the evidence was led, and when the judgment was pronounced.

(*a*) M'Allister, *supra*.

(*d*) Ibid. 473-4.

(*b*) Hume, ii. 124.

(*e*) An instance in Hume, ii. 474.

(*c*) Ibid. 66.

(*f*) Ibid.

In criminal process no judgment of conviction or punishment can be pronounced except in presence of the accused, not even imposing a fine for a petty assault, or the like (*a*). Where the accused is not in attendance, a previous order is given for his appearing at a certain time, when judgment is pronounced. If he fail to appear, he is arrested as formerly mentioned.

It has been found, that if the proceedings themselves, before the justices, have been regular, it will not be fatal to the judgment that the record of it is not quite full and regular, provided it be intelligible (*b*). But still justices ought to endeavour to express their judgments as correctly and regularly as possible.

The judgment must be signed by two justices, or by the justice who is chosen preses, if more than two be present; and all judicial steps of procedure ought to be so also; but incidental orders or warrants are usually signed only by one justice.

Where the judgment orders imprisonment as a punishment, it is executed immediately. The same course is followed where the imprisonment is ordered to enforce payment of a fine, at least where the escape of the accused is apprehended. In other cases, at least where the fine is high, an interval of a few days is sometimes allowed at the discretion of the Court, in order to give time to raise the money, or to get the judgment reviewed. Where the judgment authorizes pinding and arrestment, as is the usual course for penalties in statutes not pointing out a particular course, there is commonly an interval of some days allowed before extract, differing in different counties.

All "criminal judges" must take the proof and pronounce judgment with open doors (*c*).

For the procedure specially appointed for certain petty offences, see those offences.

For imprisonment for damages along with punishment, see sect. Civil Cases.

See *Courts.—Parties.—Punishment.—Review.*

## II. IN CIVIL CASES.

There are one or two sets of cases of a civil nature, competent before the justices, independently of the small debt act.

(*a*) M'Allister, *supra*.—Hume, il. 66. 500.

(*b*) Broadford against Nicholson, 14th November 1807.

(*c*) 1693, c. 27.—Hume, il. 297.—By special authority, the Court of Justiciary may close doors in cases of rape, adultery, and the like, tending to corrupt; 1693, c. 27; Hume, *ibid*.



(See *Justices*, sect. Particulars not in Commission.) These are conducted in a manner very analogous to criminal cases. And many of the particulars which have been mentioned as applicable to those cases (and which need not be repeated) are also applicable to these.

It may be proper to mention here that, as a civil claim, though founded upon a crime, is not a ground for imprisoning a person till he shall find caution to answer (see *Imprisonment*) so neither does such a claim authorize the arrest of a party for examination either in the process or preparatory to process.

Civil cases before the justices are usually brought into court by a petition or claim, which narrates the grounds of claim, and concludes that the defender should be ordained to satisfy it. It is generally (and, it appears, properly) signed by the pursuer, or his procurator; sometimes by the clerk.

Answers are usually appointed to be given in to the petition within a short time, by an order signed by a justice. And these are usually followed by replies. The time for answering and replying depends upon circumstances. It is commonly 4 or 6 days.

Those papers are usually drawn and signed by procurators.

If the defender fail to give in answers, he is held as confessed, and decree is pronounced against him, with expences. If the petitioner fail to give in replies, the justices dismiss the action, with expences.

When the debate has been concluded, frequently the defender's judicial declaration is taken if the court think it proper, and sometimes the pursuer's. The proper use of the declaration being to limit a proof by witnesses, it is understood not to be admissible in cases where such proof is not admissible; for example, not where a reference to oath of party is intended from the first, or is the only mode of proof competent. (See *Proof*.) It is usually ordered under certification that, if the party refuse to declare, he shall be held as confessed. It seems to be understood that, in a civil action founded upon a fact, which, if prosecuted criminally, would involve the party in punishment or legal infamy, his judicial declaration cannot be taken under the certification of being held as confessed (*a*), without the competency of which certification a declaration in civil cases ought not to be taken. But perhaps there may be a relaxation of this rule where the offence is such as might have been referred to the party's oath in a criminal prosecu-

(*a*) See Gordon against Campbell, 22d December 1809; and Nisbett and Buchan against Cullen, 1st February 1811.

tion. (See *Proof*, sect. Confession.) It has been found that the suspected accomplice of a robbery, who has been received as a witness for the crown in a criminal prosecution, and has thus been discharged from all criminal consequences of the offence, may be judicially examined (under the certification of being held as confessed) in a civil action against him, at the instance of the person robbed, for the recovery of his property (*a*). The judicial declaration is taken either in court, or by the clerk, or a justice, by commission.

If enough be admitted in the declaration on either side, decree is given accordingly. If otherwise, the justices (sometimes after getting the allegations of the parties articulately stated in a condescendence and answers) allow a proof; and either appoint a diet for taking it themselves, or more usually grant a commission to a justice or the clerk to take it, and to fix a diet for the purpose, to be reported on a certain day. It is taken in writing. It is taken in presence of the parties or their procurators, or in the absence of either party, if without good cause he fail to appear. If the party fail to lead his proof, or to report it at the appointed time, the term (if the opposite party desire it) is circumduced, so as to prevent his leading it; unless the court see cause for prorogating the term. On the proof being declared to be concluded, or the term circumduced, the justices make *avizandum* with the proof.

When the proof is by oath of party, in consequence of a reference (which may be made by the other party personally present in court, who ought to sign a minute to that effect, or by his procurator authorized by a special mandate for that purpose; see *Mandate*, sect. Advocate and Procurator) a diet is fixed for his appearing to depone, either before the court or before a commissioner; and if he fail to appear, he is held as confessed, and is decerned against, or *avizandum* is made, as the case may require.

When the proof allowed is by writ, diligence is granted against havers. If required, first and second diligence is granted to compel the havers to exhibit and depone. A party may also be called upon by the opposite party, and ordained to exhibit and depone: the diet being fixed as in an order to depone on a reference, and under the certification of being held as confessed. It is understood that the same questions are usually put to havers examined by the authority of inferior courts as to those examined by the authority of the Court of Session, (See *Commission to take Proofs*.)

(*a*) Jantzen against Easton, 3d February 1814.

When a point of legal difficulty arises, the Court, if they find it necessary, order informations or memorials upon it. But usually there are no written proceedings (nor indeed proceedings of any kind) other than the petition, answers, and replies, with the declaration and proof.

During the proceedings, a reasonable application for delay is not rejected.

When the case is discussed, the Court pronounces judgments, assailing the defender, or ordaining him to comply with the terms of the libel. The party who prevails is allowed expenses, unless where there is some strong reason against it.

An extract of the judgment is given out by the clerk, on which execution by poinding and arrestment proceeds. There is commonly an interval of a few days between judgment and extract, in order to give time for review. A different interval is observed in different counties.

Where the civil interest to be pursued for arises from a wrong, it is sometimes contained in the same libel with the criminal charge, and carried on along with it. As to the competency of justices to such civil actions, see *Justices*, sect. Particulars not in commission. As to imprisoning for such civil interest, see *Imprisonment*.

### III. FORMS OF PROCEEDINGS.

#### 1. *Complaint for an Assault.*

“ Unto the Honourable his Majesty’s Justices of the Peace  
“ for the county of

“ The petition of A B, procurator-fiscal of court, for the  
“ public interest,

“ Humbly sheweth,

“ That, on the                      day of                      or one or other  
“ of the days of that month, or of the month of  
“ immediately preceding, or of the month of  
“ immediately following, C D” [design him] “ did, at  
“                      , in the parish of                      within the said county,  
“ violently, and without provocation, assault and beat E F”  
“ [design him] “ to the effusion of his blood, with a stick or  
“ cudgel.” [In those cases in which the accused has been pre-  
viously apprehended, and a declaration taken, which is to be

founded upon, the declaration may be noticed as follows, along with other articles, if any, which are to be produced in evidence.] “ And that the said C D having been apprehended “ and carried before G H,” [design him], “ one of his Majesty’s “ justices for the said county, and examined by him on “ “ did emit a declaration ; which declaration, and also “ a stick or cudgel therein referred to, which are to be used in “ evidence against the said C D, will be lodged in the hands “ of the clerk of court, that he may have an opportunity of “ seeing the same : At least, time and place foresaid, the said “ E F was beaten to the effusion of his blood ; and the said “ C D is guilty, actor, or art and part thereof.

“ May it therefore please your Honours to grant warrant “ for imprisoning the said C D in the tolbooth of “ “ for such time as to your Honours shall seem “ just, and to fine the said C D in the sum of “ or other suitable sum, payable to the petitioner for the “ public interest, and expences ; and to grant warrant of “ imprisonment till payment ; or to do otherwise as your “ Honours shall see cause.

“ According to justice, &c.

“ A B, P. F.”

[The complaint for any other offence against the common law, *e. g.* theft, or reset of theft, may be in similar terms, *mutatis mutandis*].

## 2. *Complaint for Offences against the Game Laws.*

“ Unto, &c.

“ The petition of E F,” [design him] “ with concurrence of “ A B, procurator-fiscal of court, for the public interest,

“ Humbly sheweth,

“ That C D” [design him] “ did, upon the “ day of , upon the private com- “ plainer’s lands of in the parish of , “ and in the county of , kill , although “ not qualified to kill game in Scotland by having a plough- “ gate of land in heritage, and not having the permission of “ the private complainer, the proprietor of those lands, who

" is so qualified ; whereby, in terms of the act of Parliament  
 " passed in the year one thousand six hundred and twenty-one,  
 " chapter thirty-one, he has subjected himself to a fine of one  
 " hundred pounds Scots, one half to the private complainer,  
 " the other half to the procurator-fiscal, for the public interest.  
 " And farther, that the said C D had in his possession, and  
 " carried upon the                      day of                      , at  
 "                      ,                      partridges, although not quali-  
 " fied to kill game in Scotland, and not having for that effect  
 " the permission of a person so qualified ; whereby, in terms of  
 " the act of Parliament passed in the thirteenth year of the  
 " reign of his late Majesty King George the Third, chapter  
 " fifty-fourth, he is liable to forfeit the sum of twenty shillings  
 " sterling, that being his first offence ; one half of the said  
 " penalty to be paid to the private complainer, the other to  
 " the poor of the parish, or to repair the high-roads of the  
 " parish, as your Honours may think fit.

" May it therefore please your Honours to grant warrant for  
 " serving a copy of this petition upon the said C D, and  
 " to appoint him to lodge answers thereto within a short  
 " time ; and thereafter, upon resuming consideration of  
 " the same, with or without answers, to decern against  
 " the said C D for payment of the penalties libelled, and  
 " for expences of process ; and to grant warrant for levying  
 " the same in terms of law.

" According to justice.

" E F.

" Concurrence given by A B, P. F."

[The form has been adapted to the ordinary case of a complaint brought by the proprietor of the ground trespassed upon. It is easy to adapt it to a complaint by others, and to other cases of offence].

[Such complaints are usually presented to the judge ordinary ; in which case, a conclusion for damages for the trespass and for interdict against trespassing in future is usually inserted].

### 3. *Warrant to Cite Defenders and Witnesses.*

[Place and date.] " The justices having considered this  
 " petition, grant warrant to constables for serving the said



" C D with a copy of it, of the list of witnesses, and of this  
 " deliverance, and for citing him to appear personally to an-  
 " swer to it at , upon  
 " at o'clock, and for citing witnesses for both par-  
 " ties for the same time and place."

" G H, J. P."

[An order for written answers is usual in offences against the game laws or the like. See the procedure in civil cases.]

#### 4. *Citation of Defender.*

" I, A B, constable, charge you C D, designed in the  
 " above written petition and deliverance, to appear personally  
 " to answer to the same before his Majesty's justices of the  
 " peace, at upon at  
 " o'clock. This I do upon the day of  
 " before these witnesses, G H and J K," [design them.]  
 " A B, Constable."

[This is annexed to a copy of the petition and list of witnesses, and deliverance, each page of which copy is also signed by the constable.]

#### 5. *Citation of Witnesses.*

" I, A B, constable, charge you N O" [design him] " to  
 " appear before his Majesty's justices of the peace, at  
 " upon at o'clock, to bear  
 " witness for the complainer," [or " defender"] " in the pe-  
 " tition at the instance of E F" [design him] " against C D"  
 [design him.] " This I do" [as above.]

#### 6. *Execution of Citation of Defender.*

" I, A B, constable, upon the day of  
 " years, charged the above C D,  
 " defender, personally apprehended, by delivering to him a  
 " copy of the above complaint, list of witnesses, and deliver-  
 " ance, and a copy of citation subjoined, bearing the date of  
 " the delivery thereof, and the names and designations of the  
 " witnesses hereto subscribing, present thereat," [or, " by leav-  
 " ing a copy, &c. with his wife or servant, within his dwell-  
 " ing-house in R, in order to be given to him, because I  
 " could not apprehend him personally"]; [or, " by leaving  
 " a copy, &c. in the lock-hole of the most patent door of his

"dwelling-house, after giving six audible knocks thereat, because I could neither apprehend him personally, nor get access to the house," as the case may be] "to appear before his Majesty's justices of the peace, at upon at o'clock, to answer in the above complaint. This I did before these witnesses, G H and J K," [designate them.]

"A B, Constable."

"G H, witness."

"J K, witness."

### 7. Execution of Citation of Witnesses.

[Insert after] "to answer in the above complaint."—"And I also, upon the day of law-fully charged" [name and design the witnesses] "to appear before the said justices, time and place foreshaid, to bear witness in the above complaint; and that by delivering to each of them, personally apprehended" [or as the case may be] "a copy of citation to that effect, bearing the date, &c." [as above.]

### 8. Reading the complaint, and disposal of preliminary objections.

"At the day of one thousand eight hundred and years, before G H and J K, Esquires, two of his Majesty's justices of the peace for the county of

"The complainer present, and as his procurator," [or as the case may be] "and produced the complaint, execution of service thereof on the defender, and execution of citation of witnesses, declaration of the defender, and articles libelled.

"The defender also present, and as his procurator," [or as the case may be] "and produced execution against witnesses, and also the following articles, to be founded upon by him." [Mention the articles.]

"The complaint was read over to the defender."

"It was objected for the defender" [Insert any objection to the citation, or other preliminary objection, if there be such, with the answer to it.]

"The justices having considered the objections and the answers to them, repel the objections" [or "sustain the objections, and dismiss the complaint."]

9. *Interlocutor of relevancy, and allowing a proof.*

"It was objected for the defender to the relevancy of the "complaint," [Insert any objection to the relevancy which may be stated, if there be such, with the answers to it.]

"The justices having considered the complaint, with the "objections and the answers, repel the objections, find the "complaint relevant, and allow to the complainer a proof of "the complaint, and to the said C D, defender, a proof of "all facts and circumstances tending to exculpate him, or to "alleviate his guilt," [or, "sustain the objections, and dis-" "miss the complaint as irrelevant."]

"G H, J. P."

"J K, J. P."

[If any objection to the relevancy occur to the justices, without being stated by the defender, "The justices having "considered this complaint, in respect of" [state the ground] "dismiss the complaint as irrelevant."]

[Even although no objection to the relevancy of the complaint be stated by the defender, there ought to be an interlocutor finding it relevant, and allowing a proof: "The justices having considered this complaint, find it relevant to "infer the pains of law, and allow to the complainer a proof," &c. [as above.]

10. *Plea of the defender.*

"The defender being judicially interrogated by the justices, whether he is guilty or not guilty, he declares that "he is guilty," [or "not guilty,"] "and declares that he can-" "not write," [if it be so.]

"C D."

"G H, J. P."

"J K, J. P."

11. *Examination of witnesses, if the defender do not plead guilty.*

"Compeared N O, a labourer, residing at \_\_\_\_\_,  
"in the parish of \_\_\_\_\_, and county of \_\_\_\_\_,  
"a witness for the complainer, who, being solemnly sworn,



"purged of malice and partial counsel, examined and interrogated, depones" [insert his statement]: "Interrogated for the defender," [insert his statement upon being cross-examined]. "All which he depones to be truth, as he shall answer to God." "And depones that he cannot write," [if it be so.]

"N O,"

"G H, J. P."

"J K, J. P."

"Compeared P Q," &c.

### 12. Minute concluding the proof.

"The declaration of the defender was then read, and the complainer declared his proof to be concluded."

"A B."

"G H, J. P."

"J. K, J. P."

"The defender declared that he had no evidence to adduce."

"C D."

"G H, J. P."

"J K, J. P."

[or] "The following proof was adduced by the defender."

"Compeared R S," &c. &c. &c.

"The defender declared his proof to be concluded."

"C D."

"G H, J. P."

"J K, J. P."

### 13. Judgment.

[Place and date.] "The justices having considered the above complaint, with the judicial admission of his guilt by C D, the defender, find the complaint proven by his judicial admission," [or, "The justices having considered the above complaint, with the proof led for the complainer, and the proof led in exculpation, find the complaint proven"]; and, therefore, sentence and adjudge the said C D, defender, to be confined in the tolbooth of for the period of from this date; and grant warrant

" to constables to incarcerate him in that tolbooth, the keepers  
 " whereof are hereby ordered to receive and detain him for the  
 " said period accordingly."

" G H, J. P."

" J K, J. P."

[or] " Find the defender not guilty ; and, therefore, as-  
 " soilzie him, and dismiss him from the bar," [or] " find the  
 " complaint not proven ; and, therefore, assoilzie the defender,  
 " and dismiss him from the bar."

" G H, J. P."

" J K, J. P."

[or] " The justices, &c. and, therefore, fine and amerciate  
 " the said C D, defender, in the sum of                   ster-  
 " ling, payable to the complainer, for the public interest ; and  
 " grant warrant to constables to commit him to the tolbooth  
 " of                   the keepers whereof are hereby ordered to  
 " receive and detain him till payment of it," [or, " for the  
 " period of                   from this date, unless payment  
 " shall be sooner made."]

" G H, J. P."

" J K, J. P."

[or] " The justices, &c. and amerciate the said C D in  
 " the sum of                   of penalty, to be applied according  
 " to law, and                   of expences ; and grant warrant to  
 " constables for instant execution by arrestment, and for poind-  
 " ing upon a charge of fifteen days."

" G H, J. P."

" J K, J. P."

#### 14. *Claim for Wages.*

" Unto the Honourable his Majesty's justices of the peace  
 " for the county of

" The petition of A B" [design him]

" Humbly sheweth,

" That the petitioner was engaged by C D" [design him]  
 " to serve him in the capacity of                   , for half a-year  
 " from Whitsunday last, at the wages of                   pounds  
 " sterling for that time, payable at Martinmas next ; but that

“ the said C D dismissed the petitioner from his service on  
 “ without cause, and refuses to pay him wages  
 “ for the said half year, and reasonable board during the period  
 “ of his engagement unexpired when he was so dismissed.

“ May it therefore please your Honours to decern and or-  
 “ dain the said C D to make payment to the petitioner of  
 “ the said sum of                      for wages, of the sum of  
 “                      for board, being                      shillings per week  
 “ of the period unexpired of his service when so dismissed,  
 “ and of the sum of                      or other fit sum of expences.”  
 “ A B.”

[A copy of the petition and of the deliverance upon it, is ordered to be served on the defender, and he is ordered to lodge answers in the clerk's hands within a competent time, and replies are also ordered; or such other course is followed as is customary].

[When the proof is to be taken on commission, the court, in their interlocutor] “ grant commission to  
 “ to take the said proof any lawful day between this date and  
 “                      , to be then reported; each party giving  
 “ days notice to the other of his proceeding to lead his proof”  
 [or the Court appoint a diet for the commissioner leading the proof. It may be reported in the form under *Commission*].

#### 15. *Judgment on claim.*

[Place and date]. “ The justices having considered the  
 “ above petition, answers thereto, replies and proof adduced,”  
 [or as the case may be] “ find the said C D liable to the said  
 “ A B in the sums of                      of wages,                      of board,  
 “ and                      of expences of process; ordain him to make  
 “ payment thereof; and decern.”

“ G H, J. P.

“ J K, J. P.

For proceedings under the *Small Debt Act*, see that title.  
 See *Review.—Parties.*

## PROFANITY.

## I. PROFANE SWEARING.

JUSTICES of the peace are entrusted with the execution of the laws against profane swearing (*a*). The pecuniary penalties are for each offence, for a nobleman L. 90 Scots; a baron, 20 merks; a gentleman, heritor, or burgess, 10 merks; a yeoman, 40 shillings Scots; a servant, 20 shillings Scots; a minister, one-fifth of his year's stipend (without prejudice to other proceedings against the minister); and all others, not specially mentioned, according to their quality and degree. A half of those penalties is to be applied to pious uses in the parish in which the offender resides, or the offence was committed; a quarter to the informer and prosecutor; and the remaining quarter, in the first place, to satisfy the constable or other person who has been employed to bring the offender to justice, the rest of it to pious uses, or to satisfy the constables for their other services, at the discretion of the justices (*b*). The justices are directed to apply the laws for corporal pains, which are applicable, and, in case of inability to pay the fines, to apply the corporal pains (*c*). Those corporal pains, according to the older statutes (*d*), are chiefly those of imprisonment and setting in the stocks or jugs; or, in case of great obstinacy, flogging (*e*). (See *Punishment*.) Wives are to be punished according to the quality of their husbands; and husbands are to be liable for the fines of their wives (*f*). Any person may prosecute (*g*).

It is believed that there has not, for a long time, been a prosecution for this offence.

## II. SCOFFING AT RELIGION.

Justices of the peace are directed to inflict the same penalties as for swearing, on those "who shall be mockers or reproachers of piety and the exercise thereof" (*h*), "which words seem to reach all reviling, scoffing at, and reproaching of the established church, its ordinances, discipline, or worship. The same thing is mentioned as a known offence in these statutes, 1690, c. 25; 1696, c. 31; 1701, c. 11. Indeed, it is not to be doubted that, even at common law, all

(*a*) 1661, c. 38.

(*c*) 1661, c. 38.

(*e*) Hume, l. 562.

(*g*) 1696, c. 31.—*Not*—19 Geo. II. c. 21, seems not to extend to Scotland.

(*b*) 1661, c. 19.—1661, c. 38.

(*d*) 1661, c. 16.—1681, c. 102.

(*f*) 1661, c. 38.

(*h*) 1661, c. 38.

“speeches or practices which savour of blasphemy, or are to the evident contempt and mockery of religion, fall under the cognizance of the magistrate, as scandalous indecencies; and are punishable with the same censures as those appointed by the statutes against cursing and swearing” (*a*). There is the same provision here as in the case of swearing, with regard to corporal pains, wives offending, and application of penalties. (See *Blasphemy*.)

### III. DISTURBING PUBLIC WORSHIP.

This is not, like the two preceding offences, expressly put under the cognizance of justices of the peace. At the same time, there seems no reason to doubt that they may competently punish any inferior instance of such an offence, with fine or imprisonment, as a public indecency and breach of the peace, and lay the offender under surety of the peace, or for his good behaviour; and that, in more aggravated instances, they may take the necessary steps for having the offender tried by a higher court. (See *Arrest, &c.*) The disturbance of any congregation of tolerated dissenters seems as little entitled to impunity as the disturbance of a congregation of the Established church. (See *Nonconformists*.)

### IV. BREAKING OF SUNDAY.

Justices of the peace are directed to execute the laws against Sabbath breaking, and to levy the penalties, to be applied as those for swearing (*b*). Any person may prosecute (*c*). “To secure the due observance of the Lord’s Day, we have a long succession of statutes (*d*), most of them passed after the Reformation; which prohibit the holding of fairs or markets; all buying and selling, working, gaming, or playing; resort to alehouses or taverns; salmon fishing; going of salt pans, mills, or kilns; hiring of reapers; and in general all use of ordinary labour, employment, or sport, upon that day. The penalties appointed in those acts, especially the act 1661, c. 18, which is one of the latest, are chiefly pecuniary fines; L.20 Scots for the going of each salt pan, mill, or kiln, on that day, to be paid by the heritors or possessors; L.10 for each shearer and fisher of salmon on that day, half to be paid by the hirer, half by the person hired; and L.10 for every other profanation of that day; “with a power of ordering cor-

(*a*) Hume, l. 562.

(*b*) 1661, c. 38.

(*c*) 1696, c. 31.

(*d*) 1508, c. 83.—1579, c. 70.—1592, c. 124.—1593, c. 163.—1594, c. 201.—1661, c. 18.—1663, c. 19.

"poral punishment in case of inability to pay; but this the judge could not probably make use of to any greater extent, for a first offence, than that of inflicting a short imprisonment, or setting the offender in the stocks or jug. For a third offence, however, by 1594, c. 201, the offender forfeits his moveables, and places his person in the King's will." (But see *Punishment*.) "By 1579, c. 70, the goods exposed to sale in a fair or market upon Sunday, or in a kirk or kirk-yard, upon any day, are escheated to the use of the poor of the parish" (a).



## PROOF.

THE general law on proof is stated here. Specialties, introduced in particular cases, are noticed in considering those cases.

### I. IN CRIMINAL CASES.

A few of the particulars to be mentioned on criminal proof can rarely occur in prosecutions before justices; but are necessary to be attended to in taking precognitions.

#### 1. *Prosecutor's oath of calumny.*

A private prosecutor may be required by the accused to swear that he believes his charge to be well-founded. If he will not swear, the accused will be discharged, and cannot be again prosecuted by him for the offence in question (b). This oath is not required of a public prosecutor.

#### 2. *Judge's private knowledge.*

No judge can, in the ordinary case, convict on his private knowledge, but only on proof regularly taken; and not even on that, if he know it to be false. In certain petty statutory offences, however, justices of the peace and other magistrates are allowed to convict, on private knowledge, as noticed in considering those offences.

#### 3. *Confession of accused.*

The best proof is the culprit's confession in court, upon the

(a) Hume, i. 502-3.

(b) Ibid. ii. 126-7.

trial, if given with entire freedom, sober deliberation, and soundness of mind.

His declaration of guilt, emitted freely and voluntarily, without threats or promises, before a magistrate, on his apprehension, is a strong circumstance, but not conclusive (*a*). But it must be supported (unless admitted by the accused) by two witnesses, who know that the declaration produced was emitted freely, voluntarily, and soberly (*b*). Even verbal declarations, intimately connected with the criminal fact, as that a thief, upon being seized immediately after the fact, or that a murderer, upon the dead body being shewn to him, admitted his guilt, though not conclusive, are received (*c*). But it is doubtful whether declarations made in situations less intimately connected with the fact, or under confidence, for instance, to a fellow prisoner in jail, be ordinarily admissible (*d*).

Reference to the *oath* of the accused is not allowed in any capital crime, however low the conclusions in the particular libel; nor in any charge prosecuted for personal punishment, as whipping, pillory, or even imprisonment; nor in any charge, however low the conclusions, which is truly of an infamous and dishonourable nature, as theft, or the like (*e*). There is room for inquiry only concerning those inferior delinquencies, such as assault and breach of the peace, which are not necessarily attended with infamy, and are prosecuted for fine and damages only. Even of this, there does not appear to be any instance in the proceedings of the Court of Justiciary, within the period chiefly entitled to regard in such a question (*f*). Justices of the peace, however, in their instructions by the general statutes, are authorised to use the oath of party, where the punishment concluded for is a pecuniary sum, in the case of persons guilty of breach of the peace, of cutters of planting, persons offending against the laws of game and fishing, &c. (*g*), as noticed under those articles. And reference to oath has been found competent before the judge ordinary, in actions for pecuniary penalties, not inferring infamy, *e. g.* for unlawful importation of grain, or offences against the game laws (*h*).

(*a*) Hume, II. 315-2.

(*b*) Ibid. 318-22.

(*c*) Ibid. 322-4.

(*d*) Ibid. 324-5.

(*e*) Ibid. 325-6.

(*f*) Ibid. 327.

(*g*) 1617, c. 8.—1661, c. 38.—Justices of Ayr against Town of Irvine, 24th January 1712, Forbes—Logan against Howatson, 21st July 1776, Observation on Bench.

(*h*) Justices of Ayr, *supra*.—Hamilton against Boyd, 16th June 1742, C. Home.—Procurator-Fiscal of Edinburgh against Wilson, 27th June 1787,—Logan, *supra*.

4. *Witnesses.*

Witnesses are the most usual means of proof in crimes.

(1.) *Objections to them.*—1. *Idiotry or Furoosity*, where the recurrence is frequent, and the fits long; otherwise a person affected in this way may be received (though not with full confidence) to attest any fact that fell within the current lucid interval (*a*).—2. *Non-age*. Persons above 14 are ordinarily admissible. Persons under 14, but above 12, have been admitted by the supreme court, where the fact was simple, and the individual seemed duly aware of the nature of an oath. Persons under 12 may be examined, but not on oath; which indeed has sometimes been omitted with persons of riper years by the supreme court, when they saw cause. The objection of non-age is founded chiefly on the apprehension, that the witness may not be sufficiently confirmed in his attachment to truth, or his sense of the obligation of an oath; so that the age at the time of examination is chiefly to be regarded. If the fact be of a simple nature, and have happened recently before the young person became admissible as a witness, he may be examined upon it (*b*).—3. *Relationship*. With regard to the relations of the prosecutor. Where the fiscal is sole prosecutor, his nearest relations are competent witnesses, or the nearest relations of the persons wronged. Where a private party prosecutes for damages, or other peculiar interest, for which the public prosecutor could not insist, probably his near relations can be received only when their evidence is indispensably necessary, and even then with reservation of their credibility. It is not fixed whether near relationship be a bar to a witness, where the prosecution for punishment is at the instance of the private party alone (with concurrence, of course, of the public prosecutor). When the public prosecutor and the private party both insist for punishment, relationship to the party does not seem to be a bar to a witness. With regard to the near relations of the accused. They may, in general, be compelled to give evidence against him. But a child will not be compelled to give evidence against his parent; and will hardly be allowed, if he be a pupil. It is doubtful whether a parent may be compelled to hear evidence against a child. A wife is not allowed to give evidence against her husband, nor a husband against his wife, except in a public prosecution for a crime committed by the one against the other (*c*).—4. *Legal confidence*. The counsel or agent of the accused for the trial cannot be called upon

(*a*) Hume, ii. 320.

(*b*) Ibid. 329-31.

(*c*) Ibid. 331-2.



as witnesses against him to any circumstance which has come to their knowledge owing to their employment in that capacity; but they may, to other circumstances. And other professional and confidential advisers, as surgeons, physicians, or clergymen, have no such privilege, although a clergyman would probably not be called upon to disclose a confession of guilt which the pannel may have made to him when in jail, and preparing for trial, for spiritual consolation (*a*).—5. *Partial counsel*. An objection arises from all such behaviour in the witness, with relation to the trial, as shews undue zeal for the condemnation of the accused; as, if he come to give evidence without having been cited, or if he have, in any material degree, acted as agent for the accuser. But the circumstance of a person having been the informer, is no objection to his credit even, much less to his admissibility, though he went to the magistrate of his own accord, and disclosed the fact, (*b*).—6. *Infamy*. The accused will not be allowed to allege infamous character generally, nor even to prove infamous facts, in that trial. Even previous conviction of an infamous crime, by an inferior judge, without a jury, does not disqualify, though it may discredit. But conviction of an infamous crime by a jury, or by the Court of Session, does disqualify. The conviction must be proved by an extract by the clerk of court. A pardon removes this objection, but no lapse of time without a pardon removes it (*c*).—7. *Enmity to the accused*. A man's being the person injured is not of itself sufficient to disqualify; neither are bare words of enmity sufficient, if not accompanied with any malicious deed, nor originating in a substantial cause sufficient to create a degree of hatred which might induce a man to perjure himself (*d*).—8. *Interest in the conviction*. It is doubtful whether an informer, entitled to a reward on conviction, be admissible, unless he renounce the reward. But no disqualification arises from the natural desire to see a crime punished; nor from a patrimonial interest naturally arising from the deed of the culprit, as the recovery of stolen goods in prosecution for theft (*e*).—9. *Socius criminis*. The having been concerned as a principal actor in the crime, or as art and part, is not a good objection (*f*).—10. *Irregular citation* of the witness is a sufficient objection; as, if it take place without the proper and sufficient warrant, or when the officer has not his warrant upon him, or in another jurisdiction where the

(*a*) Hume, ii. 338-9.(*b*) Ibid. 339-40.(*c*) Ibid. 340-5.—Black against Brown, 22d December 1815.(*d*) Hume, ii. 345-51.(*e*) Ibid. 351-4.(*f*) Ibid. 354-5.

man is no officer, or the like (*a*).—11. *Misnomer*. The witness must be properly named and designed. A punctilious accuracy in the name is not essential; it is sufficient that it be substantially and to common understanding the same. Even though the name be right, the witness may be excepted to, if he either be not designed at all, or not in such a way as reasonably to distinguish the individual (*b*).

Any objection to a witness must be stated when he comes into court, before he is sworn (*c*).

(2.) *How witnesses examined*.—A witness in a criminal trial must always be sworn; even a peer. A quaker cannot be received, unless he will swear. Holding up his right hand uncovered, the witness must repeat after the judge (who ought to administer the oath, with solemnity and reverence, standing), “I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth, in so far as I know and shall be asked in this cause.” The judge must then ask him whether he has any malice or ill will towards the party against whom he is called; whether he has received any reward or promise of reward for what he should say as a witness; and whether any person has instructed him what to depone. Any promise of good deed, by the party adducing the witness, will disqualify him from being received, *in odium corruptoris*. Any thing which may tend, even indirectly, to bias the witness, as to take private and written accounts from him of what he can say, is dangerous; and though it may not, in every case, disqualify the witness, who may be above all suspicion, will subject the party to censure, and will be taken into account in considering the evidence (*d*).

Witnesses are examined separately. It is an objection to any witness about to be examined, that he has heard the deposition of any other witness at the trial. It has several times been found a sufficient objection, that a witness was present when any other witness was *precognosed* by a magistrate before trial, except in the case of those who are merely to attest the declaration. It has subsequently been found not to be a sufficient objection, where the witness’s attendance was natural in the circumstances, and did not appear to proceed from any improper motive (*e*). But it is the duty of an inferior judge to avoid, as far as possible, giving rise to the question,

A witness is entitled, if he gave a declaration, to have it cancelled before deposing (*f*).

(*a*) Hume, II. 356.

(*d*) Ibid. 363-4.

(*b*) Ibid. 357-9.

(*e*) Ibid. 365-7.

(*c*) Ibid. 362-3.

(*f*) Ibid. 367.

For the citation of witnesses, see *Process. — Arrest, &c.* sect. Precognition.

#### 5. *Articles produced in evidence.*

Frequently stolen goods or other articles, and declarations by the accused, are produced in evidence. No article can be produced and remain in court, unless the accused be warned, in the libel, of the prosecutor's intention to use it, and unless it be lodged with the clerk of court in such time as to enable the accused to examine it. It is sufficient, in the libel, to describe the articles to be produced, as "a pistol," "a bludgeon," "several of the goods stolen," or the like, except in forgery, and the like, where a more particular description is necessary. The declaration, if there be any produced, ought to be described by its date, and the name and description of the magistrate before whom it was emitted. If any article be wrong described, it cannot be used in evidence. Where those steps are not taken with articles meant to be produced, they cannot be made part of the evidence, so as to remain in court and be sworn to by the subsequent witnesses; but this does not prevent the transient production, by a witness, of an article which he carries away with him, as part of his statement (a).

#### 6. *Proof by the Accused.*

The objection to the witnesses of the accused, founded on relationship, is not subject to any absolute rule, but depends upon circumstances. Brothers and sisters have often been admitted. There are instances of the Supreme Court having admitted a child, a wife, and a mother, in particular circumstances. In recent cases, a wife and a child have been rejected. Non-age, infamy, reward, instruction, communication of the other evidence, are governed by the same rules as in the case of the prosecutor's witnesses. With regard to enmity to the opposite party, there is not occasion for so strict a rule as with the prosecutor's witnesses. Interest in the issue arises chiefly from the witness being *socius criminis*, art and part. Where several persons are accused in one libel, the Court may, if they see cause, try some first, and, if they be acquitted, use them as evidence for the others; but it is not allowable to receive, as witness for the accused, a person alleged to be guilty of the same criminal act, and not yet tried for it, but intended to be tried (b).

A general reference of the libel to the oath of the public

(a) Hume, ii. 373-81.

(b) Ibid. 385-7.

prosecutor, or even of a private prosecutor, is not competent (a).

Proof of good character, in a circumstantial or doubtful case, is of great weight to the accused, and may turn the scale. This implies a proof of particular facts illustrating it (b).

### 7. *Of proof in general.*

Evidence of what another person has been heard to say is not admissible. That person himself must be produced. There is an exception to this, where the person from whom the witness had his relation is dead, and was the sufferer by the crime, and gave his account in circumstances which naturally give it more than ordinary faith. Thus, in cases of murder, our judges have always admitted evidence of the dying declaration of the deceased, with respect to the manner and guilt of his death, even though purely verbal, and still more if reduced into writing at the time by any credible person, as an article of evidence, though not equal to an oath emitted in court (c). (See *Arrest*, &c. sect. Precognition.)

A single witness is not lawful evidence; but circumstances may supply the want of a second, as the alleged thief having been seen by one person to commit the theft, and by another to run hastily from the spot at the time, concealing something under his coat, or the like. It is lawful to convict on circumstances only, without the direct testimony of one witness who has seen the fact. In circumstantial evidence, it is not necessary that there be two witnesses to each circumstance (d). Conviction ought not to follow upon a proof entirely circumstantial, without previous direct evidence that the criminal fact alleged has been committed, or at least not if there be reasonable doubt of such fact (e).

When the accused means to defend himself by the plea of *alibi* (that he was in a different place at the time when the fact was committed) the circumstances which he proves must be such as make it not unlikely merely, but impossible, that he could have been on the spot when the crime was committed. This plea compels the prosecutor to be more special than he otherwise need be, in his proof of the precise time at which the crime was committed. If he cannot be sufficiently special, the presumption is, that the crime was committed within the time to which the proof of *alibi* applies (f).

(a) Hume, ii. 387-8.

(b) Burnett, 591.

(c) Hume, ii. 391-4.

(d) Ibid. 369-72.

(e) Burnett, 529.—Glassford on Evidence, p. 575-6.

(f) Hume, ii. 394-7.

The prosecutor is not entitled to a proof of general bad fame of the pannel, whether in temper, honesty (unless where there is a charge of *habite and repute a thief*) or any other vice of disposition. But proof of general conduct towards the party injured seems admissible, *e. g.* in a case of murder of a wife, that the accused treated her cruelly. The accused has often been allowed to prove his character in reference to the offence, *e. g.* in reference to a homicide *in rixa*, that he was of a peaceable temper. He has also been allowed evidence of the character of the party injured, *e. g.* that he was quarrelsome; but the prosecutor must be allowed to support the fame of the party injured, by evidence on his part (*a*).

## II. PROOF IN CIVIL CASES.

There are three modes of proof in civil cases; 1. The writing of the defender; 2. The oath of party; and, 3. Witnesses (*b*).

### 1. *Writing of party.*

It is not probable that cases should occur before justices of the peace in which the obligation requires to be proved by writing, and still less by a formal deed. See sect. Witnesses. At the same time, such cases may perhaps occur.

All obligations reduced into writing, though grounded upon contracts which are effectual without writing (*c*), require certain solemnities to make them effectual, or to make the writings *probative*, as it is called.

The names and designations of both the parties must be mentioned in the deed (*d*). It must be signed by the granter, or, in deeds not regarding heritage, and in matters of smaller importance (by which is understood obligations not exceeding L.100 Scots (*e*), L.8. 6s. 8d. sterling) by one notary for him, if he cannot write (*f*). A signature by initials seems sufficient, if it be proved that the party was in the use of signing in that way, and that he did sign the deed in question (*g*).

(*a*) Hume, ii. 307.

(*b*) The judge cannot proceed on his private knowledge.—The party's admission ordinarily supersedes farther proof. But admissions made with a view to settling a dispute, cannot be brought forward in evidence; Smythe and others against Pentland, 20th May 1809.

(*c*) Erskine, iii. 2. 6.

(*d*) Ibid.

(*e*) Ibid. iii. 2. 10.

(*f*) Ibid. iii. 2. 7, 9, 10.

(*g*) Ibid. 8.—Weirs against Ralston, 22d June 1813.—M'Ilwraith against M'Mikin, 23d June 1785.—Shepherd against Innes, 19th November 1760.—Pringle against Keill, February 1735; Dict. ii. 533.—Thomson against Shiell, July 1729; Dict. ii. 534,—and many prior cases; Dict. *voes* Writ.

Signature by a cross or mark is very questionable in the ordinary case (*a*), although, in particular circumstances, and where it is admitted or proved to have been truly adhibited, it has been sustained (*b*).

In addition to those particulars, there are certain further requisites to a deed relating to heritage, or inferring an obligation of importance (that is, above L.100 Scots). It must be subscribed in presence of two witnesses (for though the words of the act 1540, c. 117, ordering witnesses, are general, witnesses have, since 1579, c. 80, seldom been called to obligations not exceeding L.100 Scots (*c*), ) who must be named and designed in the deed, and who must sign along with the party, adding the word *witness* to their subscriptions; or, if he cannot write, it must be subscribed by two notaries for him before four witnesses, who must be named and designed, and must sign along with the notaries (*d*). Women or pupils cannot be witnesses to deeds. No person can be witness to a subscription unless he then know the party, and see him subscribe, or see or hear him give warrant to a notary or notaries to subscribe for him, and in token thereof, touch the notary's pen, or hear him, at the time of the witness signing, acknowledge his subscription; otherwise he is punishable as accessory to forgery (*e*). The names and surnames of the witnesses mentioned in the deed must correspond exactly with the names and surnames subscribed by the witnesses (*f*); and they must be correctly designed (*g*). Obligations of importance requiring witnesses (for though the words of the act are general, practice has limited it to such (*h*)) must have the name of the writer and his designation mentioned in the deed (*i*).

Each page, where there are more than one, should be signed by the party. But the omission to sign a page or two in a sheet, if there be other pages of that sheet signed (though such an omission ought to be avoided) will hardly hurt the deed, unless there be ground to believe that the not finishing of the signing was owing to change of mind, or to failure of faculties. This holds particularly where the deed consists

(*a*) Erskine, iii. 2. 8.—Stewart against Russel, 11th July 1815, and cases there cited.

(*b*) Cockburn against Gibson, 8th December 1815.—Kennedy against Watson, 28th May 1816.—M'Ilroch against M'Intyre, 2d December 1826.

(*c*) Erskine, iii. 2. 10.

(*d*) 1579, c. 80.—Erskine, iii. 2. 9.

(*e*) 1681, c. 5.

(*f*) Archibald against Marshall, 17th November 1787.

(*g*) Grierson against Creditors of Graham, 26th December 1752.

(*h*) Erskine, iii. 2. 12.

(*i*) 1593, c. 75.

only of one sheet (*a*). It seems essential that the last page be signed, as it contains the testing clause. The witnesses need only sign the last page. Each page must have its number written upon it; and the testing clause must mention how many there are (*b*).

It may be mentioned (although verbal legacies are valid, and may be proved by witnesses, to the extent of L.100 Scots (*c*); and although less solemnity is required in written obligations to that extent, which exceeds the amount in the small debt act, under which alone justices seem competent to judge of legacies) that if the person executing a testament cannot write, it is sufficient that it be signed by one notary and two witnesses for him, whatever its amount (*d*); and that the parish minister may act as notary on this occasion (*e*); that defects of inferior importance in a testament, and which do not throw a suspicion on the deed itself, will not be regarded; but that more material defects, as the omission to name the writer and design the witnesses, will be fatal (*f*).

Deeds which are *holograph* (that is, written with the grantor's own hand) or of which the essential parts are holograph, are good without witnesses. But their date requires to be supported by other evidence, if challenged. It is not necessary that the deed mention its being holograph (*g*).

Missive letters in mercantile transactions are valid, though not holograph, and commissions from merchant to merchant, though signed without witnesses. Fitted accounts among merchants do not require the writer's name or witnesses (*h*).

Books of accounts kept by merchants, manufacturers, shopkeepers, and other dealers, are, without subscription, probative against themselves, whether they be holograph or written by a clerk. But jottings on loose paper, unless subscribed, do not prove against the writer. No merchant's books can be full evidence in his own favour: but if they be regularly kept, and contain his whole transactions, they ought to afford at least a *semiplena probatio*; and, therefore, if they be supported by one witness in articles which admit of parole evidence, they will be received as legal proof, provided the merchant

(*a*) Kilk. Writ, No. 9.—Peter against Ross, 10th February 1795.—Smith and others against Bank of Scotland, 4th July 1816.

(*b*) Erskine, iii. 2. 6. *seq.*—1696, c. 15.

(*c*) Erskine, iii. 9. 7.

(*d*) Ibid. iii. 2. 23.—Stodart against Arkley, 18th December 1799.

(*e*) Erskine, iii. 2. 23.

(*f*) Crichton against M'Turk, 12th January 1802.—Dundas against Lewis, 13th May 1807.—The latitude of indulgence in Erskine, iii. 2. 23, seems hardly to be allowed now.

(*g*) Erskine, iii. 2. 22.

(*h*) Ibid. 24.

himself, if required, make oath in supplement that the transaction is fairly stated in them. But the authority due to the books of a merchant depends much upon his character, and upon the circumstances of the case (*a*).

Bills of exchange and promissory-notes do not require either to have writer's name or witnesses, or to be holograph. They prove their own dates ; but they must ordinarily have dates (*b*). (See *Bill of Exchange*.)

All personal obligations or contracts entered into according to the law of the place where they were signed are effectual here (*c*).

Certain stamps are, by various revenue acts, required to certain writings, without which those writings are declared to bear no faith in judgment. The acts commonly allow the writings to be stamped, if an omission have been made, generally upon paying certain penalties. Where a writing not properly stamped is founded on, process is sisted till it be produced properly stamped, where that is still allowed to be done. For the particulars, the subsisting acts must be consulted.

## 2. Oath of Party.

(1.) *Oath of Calumny*.—It is competent to either party in a suit to demand the oath of the other, that he believes his averments to be true. Oath given upon this demand, prevents the swearer from insisting in points which he has acknowledged to be groundless. Being merely an oath of credulity, it does not prevent a reference afterwards to oath of verity ; and therefore no party is bound to make oath of calumny with regard to recent facts done by himself, as such would truly be an oath of reference, and thus exclude all other proof (*d*). A person failing to give this oath at the time appointed is held as confessed.

(2.) *Oath of reference*.—Frequently, for want of other evidence, or from reliance on his opponent's veracity, the party, upon whom the burden of proving a point lies, refers it to the oath of the other party. This seems competent in all, or almost all, the civil questions which can come before justices.

The reference may be made at any time before the decree is extracted. It may be made even though the party making it have tried proof by witnesses ; whether they have sworn that they did not know, or have sworn short of the facts necessary

(*a*) Erskine, iv. 2. 4.

(*b*) Ibid. iii. 2. 25, 26.

(*d*) Ibid. iv. 2. 16.

(*c*) Ibid. iii. 2. 40.



to be proved (*a*) : or after a verdict of a jury against the party referring (*b*). The party referring may retract his offer at any time before the emission of the oath, upon payment of the whole previous expence, or of the expence occasioned by the reference; unless it be evident that he proposes to do so to obtain delay, or for some other such improper purpose (*c*).

The oath given upon reference is decisive of the cause, the parties being understood to have agreed to rest it upon what should be sworn (*d*) ; even though the party should be afterwards convicted of perjury for that very oath. But the oath will only affect the special interest referred. Thus, in the case of a riot, the procurator-fiscal may pursue for the fine, though the defender have obtained absolvitor in the action of the private party for damages, by having sworn negatively upon reference. The reference will not affect those who are not parties to it ; it will not affect co-obligants.

When a reference is intended from the first, or is the only mode of proof possible, no previous judicial declaration of the party can be taken, as the proper use of such declaration is to limit a proof by witnesses.

It has been found competent, before a cause is concluded, to refer particular facts or points of the case, which do not exhaust the question (*e*). But after a final interlocutor, reference to the successful party must embrace the whole cause, at least such parts of it as will be conclusive (*f*).

When the party referred to (if personally cited to appear, or if he has had the day of appearance notified to him in court) fails to appear, the *term* is *circumduced*, and he is held as confessed. In favourable circumstances, if he apply in his own lifetime, and so early that no detriment can accrue, and if he shew good cause for it, he may be restored against this inferred confession, and be allowed still to depone. If he die before deponing upon this second opportunity, the presumptive confession revives, and militates against his heir (*g*), unless the other party have been guilty of improper delay (*h*).

Where a party, upon reference in an oath of verity, or in an oath of supplement (to be immediately noticed), swears that

(*a*) Law against Lundin, 24th June 1747, in Kilk. p. 435 ; and in Elchies.—Dalziel against Richmond, 4th February 1792.

(*b*) Clark against Hyndman and others, 20th November 1819.

(*c*) Chalmers against Jackson, 18th February 1813.

(*d*) Erskine, iv. 2. 8.

(*e*) Cowan against M'Cormick, 21st November 1811, appended to White, *infra*.

(*f*) White against Murdoch, 9th June 1812.

(*g*) Erskine, iv. 2. 17.

(*h*) Gilmour against Representatives of Stuart, 20th June 1797.

he does not remember, he is, in the general case, absolved, as such an oath does not establish the other party's plea ; but such an oath does not prevent the other party from supporting his plea by other methods of proof. A person giving such an oath as to a recent fact, of which he cannot be ignorant, is held as confessed (*a*).

When a person swears in general or doubtful terms, particular interrogatories may be put upon a re-examination ; but he cannot be examined upon any special fact which may involve him in perjury. When the oath is clear, there can be no re-examination (*b*).

Sometimes the party to whose oath reference is made, *defers* the question back to the other party. But this is not allowed, unless it appear that he himself cannot depone so distinctly (*c*). For instance, when a man, in an action for aliment of a bastard child, refers his being the father to the oath of the mother, it would plainly be unreasonable to allow her to *defer* to his oath, as she must know best.

Sometimes the oath is qualified by special circumstances adjoined to it. Those circumstances, which are truly answers to parts of the point referred, are *intrinsic qualities* of the oath, and affect the decision founded upon it ; those which are not such answers, are *extrinsic qualities*, and, before they can have influence on the decision, must be proved by other evidence (*d*). But to enter into the illustration of this subject would lead beyond the limits of this treatise. (See the author's *Treatise on the Law of Evidence*).

For the necessity of a special mandate to authorize a procurator to refer to oath, see *Mandate*, sect. Advocate and Procurator.

(3.) *Oath in supplement*.—An oath in supplement is in certain cases allowed upon *semiplena probatio*, that is, where there has been such evidence already brought by the person proposing to swear in supplement, as produces a strong belief, though not an absolute conviction, of the fact to be proved. This oath may be redargued on proper evidence afterwards adduced ; or the cause may be advocated from the justices, on the ground that the oath ought not to have been taken. It is not competent in every kind of question. It ought not, for instance, to be admitted to eke out a defective proof of a single separate bargain, as the sale of a horse, a score of sheep, or the like. Its most proper application is to establish the truth of one or more articles in a course of dealing other-

(*a*) Erskine, iv. 2. 14.

(*c*) Ibid. 8.

(*b*) Ibid. 15.

(*d*) Ibid. 11.

wise proved between the parties, where the precise quantities furnished cannot be expected to remain long on the memory of those in the shopkeeper's service, though they may be able to swear generally that the furnishings were truly made. What proof shall entitle the shopkeeper to give his oath, seems to be a question which must, in general, be determined by the circumstances of each individual case. For example, if it should be proved, in an action for the price of an article furnished by a shopkeeper, that the defender was an ordinary customer in the kind of article in question, though there should be no witnesses to the special quantities and articles furnished, and if the shopkeeper kept regular books in which the articles in question are distinctly stated, the shopkeeper, it would seem, should be allowed his oath in supplement. Such questions may sometimes occur before the justices under the small debt act. The cases, however, in which such oaths are commonly asked from justices are, actions for the aliment of natural children, by the mother against the father. Where the mother brings evidence such as to make the fact of criminal intercourse between them, within the necessary time, extremely probable, though not quite certain, she will be allowed to give her oath in supplement, that the defender was the father; and, upon swearing affirmatively, will have decree against him (*a*). (See *Children*, sect. Aliment of Unlawful).

(4.) *Oath in litem*.—This is an oath deferred by the judge to the pursuer, for ascertaining either the quantity or the value of goods which have been taken from him by the defender, without the order of law, or for fixing the extent of his damage. It is not received, except where there is clear evidence that the defender has been engaged in some illegal act, as a *spuilzie*, or an unwarrantable intermeddling with the pursuer's goods, or where the public police has made it necessary, as in the case of the edict *Nautae, caupones, stabularii* (see *Nautae*, &c.) An oath *in litem*, as to quantities, being in fact an oath of verity, is not received where a concurring testimony of witnesses is brought in proof of them, and, when admitted for want of such concurring testimony, is not modified by the Court. The oath, as to the quality and price of the goods, being only an oath of opinion, is subject to modification; and

(*a*) A great part of these observations, on oath in supplement, in Ersk. iv. 2. 14.—Some persons have inferred, from the form of expression used by Erskine, that the oath in supplement for furnishings is only admitted where there has been one witness to the particular furnishings; but the oath seems to be admissible where there is a *semiplena probatio* otherwise; and it was found to be so, Crichton against Whitson, 17th February 1820, not reported.

the common course is to ordain the pursuer, before making oath to the quantities, to exhibit a condescendence of the prices of his goods and of his damage, with the grounds on which it proceeds, which is modified by the Court, and then the oath *in litem* is admitted, not exceeding that previous modification (*a*).

### 3. Witnesses.

Proof by witnesses is the most usual mode of proof before the justices ; and seems admissible in all, or almost all, the civil cases competent before them. In each article treated of in this summary, the proper proof for it is mentioned. Two witnesses are necessary to contracts. In civil obligations arising from delict or crime, the same proof is sufficient as in prosecuting for punishment. (See sect. Criminal.—*Damages*.)

(1.) *Objections to them*.—The following objections prevent a person from being received as a witness in a civil case.—  
1. His being related, as father, son, or brother by blood or marriage, or uncle or nephew by blood, to the party who proposes to adduce him ; which holds equally in females. But such a relation may be received *against* the party related ; except that a wife seems inadmissible against her husband (*b*), and perhaps a child against his parent (*c*). Equal or nearer relationship to the other party does not remove the objection (*d*). Near relations are sometimes admitted, where, from the nature of the fact to be proved, there must be a penury of other witnesses (*e*).  
2. His having been advocate or agent for the party in the cause. But such a person may be examined *against* his client, except with regard to matters which have come to his knowledge in consequence of his confidential situation (*f*).  
3. His being bereft of reason. But a person subject only to fits of furiosity may be received, at least *cum nota*, where the matter in question may be easily understood, and has come under his observation recently in the current lucid interval.  
4. His being infamous ; which has been explained in treating of the objections to witnesses in criminal cases (*g*).  
5. His being a *pupil*. But after he has passed that age, he is a competent witness of simple facts which happened while he

(*a*) Erskine, iv. 2, 18.

(*b*) Crawford against Campbell, 31st January 1744 ; Kilk. 5. Witnesses.—Cameron against Lawson, 18th July 1744 ; *ibid*.—Both also reported by Elchies.

(*c*) Cameron, *supra*.—Drummond, 23d July 1700 ; Fount.

(*d*) Erskine, iv. 2, 24.

(*e*) *Ibid*. 26.—Laings, 16th November 1814.—Martin against Maxwell, 8th February 1816.

(*f*) *Ibid*. 25.

(*g*) *Ibid*. 22.

was pupil (*a*). 6. His having a patrimonial interest in the case (*b*). It is by many considered not quite fixed how far a person is *admissible* in a civil case where his deponing may infer a crime against himself (*c*). He cannot be *compelled* (*d*). 7. His offering himself as a witness without having been cited (*e*). 8. His having been prompted what to depone (*f*).

(2.) *How witnesses are examined*.—A witness is sworn in the same manner in civil cases as in criminal cases; which has been already mentioned. After the oath is administered, the judge purges the witness of partial counsel; that is, he asks the witness whether he has any interest in the suit, whether he has given advice how to conduct it, whether he has received any bribe or promise for what he should depone, whether he has been instructed how to depone, and whether he bears any malice to the party against whom he is adduced: and if the answers of the witness be not satisfactory, he is not examined. When a party can bring instant proof of a witness's partial counsel in any of these respects, he ought to offer it before the witness is sworn; but because such objection, if not instantly verified, will not bar the examination, the party may protest for *reprobator* immediately before the examination, which (and nothing else) will entitle him afterwards to substantiate his allegation (*g*). A quaker's affirmation is received in civil cases. (See *Quaker*.) A peer must swear.

For the citation of witnesses, see *Process*.

See *Payment*, sect. Proof, and sect. Presumption.

See *Perjury*, *Prevarication*, and *Subornation of Perjury*.

See *Commission to take proofs*, &c.

## PUNISHMENT.

THE only concern which justices of the peace have with the higher punishments, is to know what crimes are punishable with death; so as to enable them to decide when they ought

(*a*) Erskine, iv. 2. 22.

(*b*) Ibid. 25.

(*c*) See Hay Marshall against Anderson, 26th June 1793, which was reversed on appeal.

(*d*) Stewart Nicolson against Mrs Nicolson, 6th December 1770; affirmed on appeal, 18th February 1771; and other cases.

(*e*) Erskine, iv. 2. 35.

(*f*) Ibid. 28.

(*g*) Ibid. 28, 29.

to allow a person committed for a crime to get out upon bail. (See *Bail*.)

With regard to the punishments which justices can inflict,—

*Imprisonment* is a very ordinary punishment for minor offences. There have been few instances of the supreme court extending it beyond a year or eighteen calendar months; and Baron Hume has only found one instance of their extending it beyond two years; and in any case which called for severity, they have rather added corporal punishment, or some other penalty, suitable to the offence (*a*). Sheriffs and other inferior judges, upon a conviction without a jury, do not extend the period of imprisonment beyond a year. Justices of the peace commonly imprison for ten days, twenty days, a month, or two months, according to circumstances; and seldom exceed three months. A person is sometimes imprisoned in the house of correction (when there is such) and ordered to be kept at hard labour; which, independently of statutes, appointing this course for certain offenders, such as beggars, vagabonds, and the harbourers of such, seems competent at common law (*b*). When a special statute directs commitment to the house of correction, it appears that in those places in which there are not houses of correction (and there are very few of those houses in Scotland) the offender may be committed to gaol.

*Fine* is the ordinary punishment “for assaults, if not extremely violent, and for petty riots and breaches of the peace, and such like transgressions, which do not infer a depraved disposition in the delinquent, and may have been owing to indiscretion, or some untoward concurrence of circumstances” (*c*). The Supreme Court do not appear ever to have fined for theft (see *Theft*, sect. How punished.) Justices of the peace may imprison summarily, when that seems proper, till payment of the fine (*d*). For expences, see *Process*, sect. Procedure on Complaint. The infliction of a fine is often coupled with an award of damages, and *solatium* to the private party, where he pursues for such (as to the competency of which before justices, see *Justices*, sect. Particulars not in Commission; and as to imprisonment for which, see *Imprisonment*.) Where the culprit is indigent, so that he might be detained in jail for years, or for life, for want of funds to pay the fine, he is rather sent to prison for a certain time absolutely, or a term of imprisonment is inserted as an alternative by

(*a*) Hume, ii. 471-2.

(*b*) Ibid. 472-3.

(*c*) Ibid. 473.

(*d*) L. Fullarton against Earl of Kilmarnock, 19th November 1714; Dict. i. 500.—Erskine, iv. 3. 16.

which he may redeem himself from payment of the fine (*a*). For fining a married woman, see *Marriage*, sect. Obligations by Wife. For fining a pupil, see *Minors*.

*Banishment* from the county (which is rarely made to extend beyond a few years, and which is usually coupled with a previous imprisonment in jail or bridewell) is a punishment which justices of the peace may competently inflict (*b*), but which they have rarely been in the use of inflicting (*c*), and which in the ordinary case it appears hardly to be advisable for them to inflict.

It may be mentioned that, sometimes, rather than run the risk of a more severe punishment, upon trial and conviction, the accused offers to be banished from the jurisdiction, under certification of imprisonment, or the like, in case of return. But it has been found, in the case of certain persons who had come under an enactment to banish themselves, while under commitment for further examination, and before being served with a libel, that "a person cannot, on his own application, be banished from this country, or any district thereof, under penal certifications, except when under a commitment to prison in order to trial for an offence specified, and after having been served with a criminal accusation to stand trial for the same" (*d*).

*Whipping* is sometimes inflicted by magistrates of burghs, without a jury, for broils, assaults, or outrages in the streets, keeping disorderly houses, keeping places of resort for thieves or stolen goods, or other the like offences, against the police or tranquillity of the burgh (*e*). But it is not inflicted by sheriffs, without a jury, even for this order of offences; nor by the magistrates of burghs, without a jury, for crimes of a higher denomination (*f*). And it has been found, upon inquiry (*g*), that, with the exception of one or two counties, it is not inflicted by justices of the peace; and the inflicting of it by justices seems not advisable, and is commonly considered as a stretch of power.

The whipping of females, publicly or privately, is abolished by statute; and confinement to hard labour in the gaol or house of correction from one to six months, or solitary confinement therein, not exceeding seven days at one time, is substituted (*h*).

(*a*) Hume, ii. 474.

(*c*) Hutcheson's J. P. 3d edit. l. 200.

(*d*) Suspension and liberation, Johnston and Baird, 3d January 1815; *Judiciary Records*.—Hume, ii. 131.

(*f*) *Ibid.* 145-7.

(*h*) 1 Geo. IV. c. 57.

(*b*) *Ibid.* 143.

(*e*) Hume, ii. 144-5.

(*g*) Hutcheson's J. P. 3d edit. l. 220.

The day on which a corporal punishment, *e. g.* whipping, is to be inflicted, is mentioned in the sentence.

No corporal punishment, short of death or demembration, *e. g.* whipping, can be carried into effect till after elapsing of eight days from the date of the sentence, south of Forth, or twelve days north of it (*a*).

*Pillory*, in consequence of special statute, can now only be inflicted, either for perjury, whether upon oath or by a false affirmation, which, in certain cases, is held equivalent to an oath, *e. g.* in the case of 'quakers, or for subornation of such perjury (*b*). It was formerly used in several cases; but fine or imprisonment, or both, are now substituted for it (*c*). *Pillory*, therefore, can now only be inflicted by the Courts of Session or Justiciary, as they only are competent to try for perjury or subornation of perjury.

*Infamy* can only be inflicted by the conviction of a jury, or of the Court of Session; and, therefore, where the charge is truly of an infamous nature, justices of the peace ought to refrain from trying it. See *Justices of the Peace*.

*Deprivation of office* may be inflicted on the officers of court, for falsehood or corruption in the discharge of their duties (*d*).

Unusual punishment of any kind is reprobated. The Supreme Court are said to have expressed great indignation at a judgment of the magistrates of a burgh, who, upon very illegal procedure, had sent a landman to the sea service, for an affray upon the streets (*e*).

It is not competent, in a sentence of punishment, to reserve a power to mitigate (*f*). See *Review*.

See *Wrongous Imprisonment*.

### QUAKER'S AFFIRMATION.

EVERY quaker, who is required on any lawful occasion to take an oath, may, instead of it, make a declaration in these

(*a*) 3 Geo. II. c. 32, sect. 2.—In capital punishments and demembration, the infliction of the punishment cannot be within less than 30 days south of Forth, and 40 days north of it; 11 Geo. I. c. 26, sect. 10.

(*b*) 56 Geo. III. c. 138, sect. 1.

(*c*) *Ibid.* sect. 2.

(*d*) Hume, ii. 473.

(*e*) Nash against Robertson, 18th March 1804; in Hutcheson's J. P. 3d edit. i. 227.

(*f*) Suspension, Tweedale, 18th June 1803; Hume, ii. 457.



words :—" I, *A B*, do solemnly, sincerely, and truly declare " and affirm ;" which is of the same force as an oath, and if false, subjects to the pains of perjury. But no quaker is qualified (by the acts allowing this declaration) to give evidence in any criminal case, to serve on juries, or to bear any office or place of profit in the government (*a*).

See *Nonconformists.—Oaths.—Proof.*

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## RAPE.

RAPE is the carnal knowledge of a woman's person, by penetration of her privy parts, forcibly and against her will. The crime must be effected by force or intimidating threats at the time. It would appear that stupefaction by potions will be fatal to the accused. Carnal knowledge of girls under puberty is considered as forcible, as it is held that they cannot consent to connexion. It is equally criminal though committed on a prostitute. There may be art and part of this as of other crimes. The punishment is capital. It will save the prisoner's life, though it will not screen him from all punishment, if the woman acquiesce, and (though contrary to the truth) declare that she consented. This crime may be prosecuted either by the public prosecutor, by the woman, or by her near relations. It is a circumstance unfavourable to the prosecution, that it, or the disclosure of the fact, has been long delayed. The woman is a competent witness where she is not prosecutor (*b*).

An assault with intent to ravish is not capital, but is highly punishable. Corruption of the morals of young females is in the same situation ; as is also forcible abduction and marriage ; but if the woman be also ravished, the offence is of course capital (*c*).

Justices of the peace, of course, cannot try for crimes of so heinous a nature ; but they may prepare the case for trial by a higher court. (See *Arrest, &c.*)

(*a*) 7 and 8 William III. c. 34, sect. 1, 2, 3, 6.—1 Geo. I. St. 2, c. 6—8 Geo. I. c. 6, sect. 1, 2.—22 Geo. II. c. 46, sect. 36.

(*b*) Hume, l. 297, 305.

(*c*) Ibid. 305-6.

## RECOGNIZANCE.

THIS is a term of English law. It occurs sometimes in British acts of Parliament, to be executed by justices. Various particulars with regard to it, mentioned by the English writers, seem inapplicable in Scotland. It seems to be merely a bond by which one or more persons become bound to forfeit a certain sum, on failure to perform a certain thing. The occasions in which it may be exacted, the amount, &c. are mentioned in their proper places.

See *Bail*.

## RECOMPENSE.

THIS article comprehends several sets of cases, which seem competent before justices under the small debt act; but none of which can often occur before them.

## I. PROFIT BY ANOTHER'S LOSS.

A person who is a gainer by the loss of another, without any purpose of donation, must indemnify him, either of his whole expence, or so far as he himself is a gainer. This applies even in the case of pupils, though they cannot bind themselves by any contract (*a*). Thus they must repay money borrowed, so far as profitably applied to their use. (See *Minors*.) It is necessary that the pursuer have sustained an actual and substantial loss; it is not sufficient that the defender has reaped advantage from an operation which has answered its own purpose to the pursuer. It is also necessary that the defender have been a positive gainer; it is not sufficient merely that he is less a loser than, if it had not been for the pursuer, he might have been. Thus, the furnisher of goods, remaining unpaid, which form the chief fund of payment of a bankrupt's creditors, has no action on this ground against the other creditors. Where, however, a person *bona fide* lays out money in repairing the property of another, so as to prevent it from going to decay, he has action; for the other is a positive gainer by being saved the effects of the natural decay of the subject. The profit of the one must have arisen from the loss of the other. The profit must be substantial and real.

(*a*) Erskine, iii. 1. 11.

## II. NEGOTIORUM GESTIO.

This produces those obligations which arise from the management of one's affairs in his absence by another, without a mandate from him (*a*).

The person whose affairs are managed, must repay to the *negotiorum gestor*, or manager, all the disbursements which he has made on his account in the course of the management, and also interest, and must relieve him of all the obligations under which he has come in consequence of the *gestio*: and, if those disbursements and obligations appear rational, it makes no difference though the subject to which they related should perish by accident; but he is not bound, though the event be favourable, to give to the *gestor* any reward for his service (*b*).

The *negotiorum gestor* is accountable to the owner for all the money and subjects belonging to him, which have come into his hands, and even for interest, where the sum carried interest formerly (*c*). Where the *gestor*, from friendship, and the necessity of the case, undertakes an affair requiring immediate execution, he is liable for the consequences of gross omissions only. Where his motives appear selfish, or where he acts contrary to the express will of the owner, or involves him in a new concern, in which he never dealt formerly, he is liable for accidents; and is not entitled to disbursements, except as far as the owner has been a gainer. Where there are no special circumstances on either side, a middle degree of diligence is due (*d*).

Upon the principle of this doctrine, if a person lay out money prudently and properly, with a view to the advantage of a thing hired by him, or borrowed by him, or received by him in pledge, or deposited with him, he is entitled to reimbursement. Thus, if a person hire a horse, and it become unwell, he will be entitled to the expence properly incurred by him in attempting to cure it, though it should die.

## III. INDEBITI SOLUTIO.

Where a person has paid a sum of money from an erroneous belief (whether the error was in fact or in law) that it was due by him as a debt, he is, in the ordinary case, entitled to pursue for repayment: the action for which is called *condictio indebiti*. But he is not entitled to pursue for repayment, either if the sum was due by a natural obligation, though it

(*a*) Erskine, iii. 3. 52.

(*b*) Ibid. 5.

(*c*) Ibid.

(*d*) Ibid. 53.

could not have been enforced by an action, as where a minor has repaid a loan of money ; or if he knew, when he made the payment, that the debt was not due ; or if the claim has been settled by transaction, though it should afterwards appear that it was not due (*a*).

#### IV. RELIEF OF CO-OBLIGANTS AND CAUTIONERS.

Where two or more persons are bound conjunctly and severally, each for the whole, any one paying more than his share has relief against the rest for their proportions. This holds also among co-cautioners (*b*). Where a cautioner pays the debt, the creditor may be compelled to assign to him the grounds of debt, that he may the more easily operate his relief against the principal debtor.

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#### RETENTION.

RETENTION (questions on which may occur before justices in the exercise of their civil jurisdiction) is nearly allied to *compensation* : but has not, like it, the effect of extinguishing obligations ; it merely suspends them, till he who pleads it obtains payment or satisfaction for his counter claim (*c*).

It is of two kinds.

The *first* kind occurs in mutual contracts ; and entitles either party to delay performance till the other party be ready to perform his part. Thus, an agent may retain his client's papers till his account be paid ; a person who has sold goods may retain them till he receive payment of the price, unless the bargain was for credit ; a stabler may retain the horse committed to him till he receive the stipulated recompense ; a carrier may retain the goods which he has carried till he be paid for the carriage ; a tradesman may retain the piece of work which he was employed to make till payment of the expence which he has debursed on it, and of the price of the workmanship (*d*).

The *second* kind is a sort of supplement to compensation, used where, from the claims being different from each other in

(*a*) Erskine, iii. 3. 54.

(*b*) Stair, i. 9. 9.

(*c*) Ersk. iii. 4. 20.

(*d*) Ibid. 21.

their nature, compensation does not apply; founded upon the consideration that no person is entitled to the aid of a court of law while he refuses to satisfy a claim against him by the debtor. Thus, although a debtor in a sum of money, who afterwards becomes cautioner for his creditor in a separate debt, cannot plead *compensation* upon his bond of relief till he be distressed, because till then he is only a conditional creditor of the principal debtor, yet he may plead *retention*, even against an onerous assignee of the money debt, till he be relieved of his cautionary obligation (*a*). Thus, also, consignees, brokers, or other commercial agents, have, upon their constituent's bankruptcy, a right of retention against him or his creditors upon the goods or money belonging to him in their hands, for payment of the general balance due upon their account, and for relief of all engagements under which they have come on his account, on the faith of the goods and money continually passing through their hands.

To make way for retention, the possession must be legitimate in the person of the holder, and as distinguished from that of the owner. For instance, a servant cannot retain the effects of his master which have come into his possession by reason of his service, even for payment of his wages; for the servant's possession of those is held to be the master's. The possession must have been obtained in a lawful way.

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## REVIEW.

The general rule is, that the judgments of the sessions of the peace may be brought under review. Exceptions to this rule are noticed under the articles in which they occur.

### I. CRIMINAL CASES.

The judgments of the common sessions in criminal cases may be reviewed by the quarter sessions by appeal. This is competent at any time before execution. An appeal to the quarter sessions from an interlocutory judgment does not stop the justices from proceeding and finishing the cause by sentence; but, if such an appeal be entered, they ought to admit it, and it prevents them from proceeding to execution till it be

(*a*) Erskine, lii. 4. 20.

discussed (*a*). In some cases of penalties under special statutes, appellants to the quarter-sessions must, by those statutes, find caution to implement the judgment of the petty sessions if it shall be affirmed: and in some counties, by ancient usage, appellants, both in criminal and civil cases, find caution for the expences.

The judgments of either the common or quarter sessions in criminal cases may be reviewed by the Court of Justiciary by advocation: which has in later times been used even after sentence has been pronounced, though originally, and perhaps strictly only applied during the dependence (*b*). It is obtained upon a bill presented to the Court of Justiciary (*c*). Those judgments may also be reviewed by the Court of Justiciary, by suspension, at any time before complete execution (*d*). Both suspension and advocation stop proceedings before the justices. Suspension or advocation before the Court of Session are not competent, even though the punishment should be only a fine (*e*). When any bill of advocation or of suspension is presented to the Court of Justiciary against a sentence pronounced in a criminal case, carried on at the instance of the procurator-fiscal, intimation of it ought immediately to be made to the crown agent, by the procurator-fiscal, in order that the crown counsel may be enabled to determine whether it is expedient to support the judgment so pronounced; and in the event of that course being followed, the expence of

(*a*) Meldrum against Brown, 23d December 1746; Kilk. p. 304.

(*b*) Hume, ii. 491.

(*c*) Ibid. 492.

(*d*) Ibid. 494-7.

(*e*) Berry against Walker and Rodger, 17th January 1809.—Johnstone against Guthrie and Finlay, 15th May 1810, Fac. Coll. 212.—Cumming against Johnstone, 29th June 1810; Hume, ii. 70.—Meek against Watson and Ramsay, 5th June 1812; Fac. Coll.—Hume, ii. 69-71.

*Notes.*—Another mode of review in criminal cases is by appeal to the next Circuit Court of Justiciary; which is competent against final sentences, not inferring death or demembration, pronounced by sheriffs, stewards, courts of royal burghs, or of burghs of regality or barony, or courts of barons or other heritors, not taken away by the jurisdiction act quoted (see Preface, towards the end); the appeal being entered in open court at pronouncing sentence, or, at any time within ten days thereafter, being lodged with the clerk of the court from which the appeal is taken; and the other party being served with a copy of it, personally or at his dwelling-place, or his procurator in the cause, and the inferior judge being also served where there is any conclusion against him, at least 15 days before the time of holding the Circuit Court; and a bond, with a sufficient cautioner, being lodged by the appellant with the clerk of court (who is answerable for the cautioner) at entering the appeal, to abide the judgment of the Circuit Court, and to pay costs if any shall be awarded; 20 Geo. II. c. 43, sect. 34, 36, 37.—But, as justices of the peace are not mentioned in that act, it has been found that such appeal is not competent from their judgments; Sir John Maxwell and others against Stansfield, 5th June 1820, Court of Justiciary; Fac. Coll. App.

the subsequent proceeding is defrayed by the crown agent, who afterwards takes the sole charge of the case; and when such intimation is neglected to be given, the public instance is withdrawn in the Court of Justiciary (*a*).

Justices of the peace cannot review a judgment in criminal cases pronounced by themselves (*b*): except in so far as the quarter sessions may review the judgments of the petty sessions.

## II. CIVIL CASES.

The judgments of the petty sessions of the peace in civil cases may usually be reviewed by the quarter sessions. (See sect. Criminal Cases.)

The judgments of the petty sessions, or of the quarter sessions, in civil cases, may also be reviewed by advocacy or suspension in the Court of Session; or if the party aggrieved have paid, by reduction in that court (*c*). Advocacy from interlocutory judgments of inferior judges is allowed only, *first*, on incompetency, including defect of jurisdiction, personal objection to the judge, and privilege of party: *secondly*, on contingency: *thirdly*, on legal objection with respect to the mode of proof, or to some change of possession, or to an interim decree for a partial payment; but in the cases under this third head, leave by the inferior judge is required (*d*). Advocacy on the ground of error is allowed only after a final judgment (*e*).

Decrees under the small debt act are not subject to advocacy, nor to any suspension, appeal, or other stay of execution; but may be reviewed by reduction before the Court of Session. (See *Small Debt Act*.)

Justices, it is understood, cannot review a judgment in a

(*a*) Rules for precognitions, &c. by King's Counsel, 21st February 1824. See references in *Arrest*, &c.

(*b*) Hume, ii. 458.—Appeal, M'Nish, &c. against Binny, 23d May 1810, in Books of Adjournal, and Hume, *Ibid.* *Notes*. The appellants were fined, and laid under surety of the peace by the justices of Stirlingshire for a riot. Both they and the other party reclaimed. The justices varied their interlocutor. The defenders appealed to the Circuit Court, who certified the case to the High Court at Edinburgh. They "Find that it was not competent for the justices of peace to review or alter their first sentence; and therefore reverse the second judgment," &c.

(*c*) Erskine, iv. 3. 8.

(*d*) 50 Geo. III. c. 112, sect. 36.

(*e*) Sect. 37. *Notes*.—Appeal to the Circuit Courts is competent from final judgments in civil cases to the amount of £25, pronounced by the courts mentioned in a preceding note, and in the same manner.—20 Geo. II. c. 43, sect. 34, 36, 37, made perpetual by 31 Geo. II. c. 42, sect. 7.—54 Geo. III. c. 67, sect. 5. But, as mentioned in that note, this mode of redress has been found not to extend to judgments by justices of the peace.

### III. FORM OF APPEAL TO QUARTER SESSIONS.

**“ The petition and appeal of A B,” [design him.]**

“ That the petitioner begs leave to submit to the review of  
“ your honours the following judgment of the justices in the  
“ petty sessions” [state the facts, the judgment pronounced,  
and the grounds of appeal.]

[This appeal is at once dismissed, if it do not throw considerable doubt upon the judgment of the petty sessions. Otherwise, it is ordered to be answered; and it is afterwards advised with the answers.]

**RIOT.**

**I. AT COMMON LAW.**

*Riot, or Mobbing*, signifies a tumultuous assemblage of a number of persons for a violent purpose, to the disturbance of the public peace. There may be a convocation for an unlawful purpose, which is not mobbing, as saying mass; there not being in this case that apprehension of violence which is ca-



essential to mobbing. This crime may be committed in doing a lawful act, as executing a diligence, or searching for run goods, if done with tumult and disorder. It must be a *combination* for violence, in defiance of authority, to the prejudice of *others*; in which it differs from a casual affray or quarrel, arising suddenly among individuals, who have no such hostile views against the peace of the neighbourhood: but it is sufficient that a tacit confederacy have been formed after the meeting; it is not necessary that the meeting was called together for the purpose. It must be for an object of *private* concern, as to rescue a certain criminal, or to break down a certain inclosure; for if it be for an object of *public* concern, as to throw open all prisons, or to break down all inclosures, it is not mobbing but treason. Mobbing is constituted by destroying, rifling, damaging, or invading the property of individuals or the public; or by any injury done to the persons of individuals, or by invading, seeking, or pursuing them with intent to abuse, confine, or put them in fear; or by violently intimidating or constraining any one to act contrary to his interest, duty, or inclination. Although the assembly have not proceeded to acts of force or outrage, if they have plainly discovered their purpose to engage in some violent enterprise, and have made a movement, or taken some measure towards the execution, this is an act of mobbing. The tumultuous assembling for a violent purpose is sufficient, without acts of violence (*a*).

A person may be art and part of this crime by assistance or instigation, though not present in the tumult. Presence in the mob for a short time, from indiscretion or curiosity, does not subject a person as art and part; he is not liable as such unless he have truly made himself one of the mob by the part which he takes in their proceedings. Every one in a mob is art and part of all the acts done by any part of it, if not quite out of the bounds of the purpose of the mob (*b*).

At common law, mobbing is not capital. But acts may be done by persons in the mob, which shall subject those persons, and all who have been specially concerned in those acts, to capital punishment; as murder or fire-raising (*c*).

## II. RIOT ACT.

The common law has been considerably extended by the *Riot Act* (*d*). This act contains two principal provisions.

(*a*) Hume, i. 411-415.

(*c*) Ibid. 421-424.

(*b*) Ibid. 416-420.

(*d*) 1 Geo. I. c. 3.

By *one provision*, it is made capital if any persons unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully, and with force, demolish or pull down, or begin to demolish or pull down, any church, or chapel, or any place for religious worship, tolerated by law, or any dwelling-house, barn, stable, or other out-house (*a*). This capital sanction has, by acts which seem to apply to Scotland, been extended to persons so assembled, with force demolishing or pulling down, or beginning to demolish or pull down, any mill (*b*), or any building or erection for carrying on trade or manufactures, or for depositing goods (*c*), or demolishing, pulling down, or damaging, or beginning to demolish, pull down, or damage any engines, erections, or other works belonging to collieries (*d*). (See *Damages*, sect. Riot.)

By *the other provision* of the riot act, it is made capital if any persons to the number of twelve, being unlawfully, riotously, and tumultuously assembled, to the disturbance of the peace, and being required, if in a county, by any one justice of the peace or the sheriff or under sheriff of the county; and if in a city or town corporate by the mayor or a bailiff, or other head officer or justice of the peace of such city or town corporate (not an ordinary constable or peace officer (*e*)), by proclamation in the king's name, to disperse themselves, and to depart to their habitations, or lawful business, continue together unlawfully, riotously, and tumultuously for an hour after proclamation (*f*). This proclamation is made in this manner. The justice of the peace, &c. is to go among the rioters, or as near to them as he can safely come, and to command silence while proclamation is making, and then openly to make proclamation in these words, or "like in effect."—*"Our Sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies. God save the King."* And every such justice, &c. on notice or knowledge of such unlawful assembly, is to resort to the place, and make proclamation in this manner (*g*). The giving such command is commonly called *reading the riot act*. It is not necessary, in order to autho-

(*a*) 1 Geo. I. c. 5, sect. 4, 10.

(*c*) 52 Geo. III. c. 130, sect. 2.

(*e*) Hume, i, 430.

(*g*) Ibid. sect. 2.

(*b*) 9 Geo. III. c. 29, sect. 1.

(*d*) 56 Geo. III. c. 125, sect. 1.

(*f*) 1 Geo. I. c. 5, sect. 1.

rise proclamation, that the meeting have proceeded to any felonious attack upon property or person, such as wounding, fire-raising, or breaking into houses; it is sufficient that the persons be unlawfully, riotously, and tumultuously assembled; that is, with such circumstances of force, agitation, and disorder, as are alarming to the lieges, and amount to a disturbance of the public peace (*a*). And if they continue so assembled for an hour after proclamation, they are guilty of the capital crime, though they have not attempted to commit any felonious outrage (*b*). If the rioters proceed to any invasion of property or person, they may not only be tried and punished for the offence, but may be forcibly resisted, suppressed, and taken on the spot, either by the magistrate, or by the individuals invaded, and their assistants, at common law, though the hour have not expired, or though proclamation have not been made at all (*c*). The capital sanction for continuing assembled an hour after proclamation, is incurred by all who were present at making it (for all such are presumed to hear it), or who were informed of its having been made, and are in the mob after an hour from its being made (*d*). All who hinder or hurt any person who begins to make proclamation are punishable capitally; as are all persons so unlawfully assembled to the number of twelve, if they continue together an hour after such hindrance, knowing of it (*e*). If the persons so unlawfully assembled do not disperse within an hour, every justice of the peace, sheriff, mayor, &c. and every high or petty constable, or other peace officer of the county or town, and such other persons as shall be commanded to be assisting to such justice, sheriff, mayor, &c. (who are authorised and empowered to command all his Majesty's subjects of age and ability to assist) may seize and apprehend such persons so unlawfully continuing together after proclamation made, and forthwith carry them before a justice of the peace of the place where they are apprehended, to be proceeded against according to law (see *Arrest*, &c.); and if the persons so unlawfully assembled be killed or hurt by their resisting the persons so dispersing or seizing them, such justices, &c. peace officers, and private assistants, are indemnified (*f*), if they have acted with due humanity and discretion (*g*). The magistrate, indeed, has the same powers of arrest, at common law, as those contained in this clause (*h*). Those who have recently joined the multitude, whether they be in the knowledge of the proclamation or

(*a*) Hume, i. 431.

(*b*) Ibid.

(*c*) Ibid.

(*d*) Ibid. 431-2.

(*e*) Ibid. 432.

(*f*) 1 Geo. I. c. 3, sect. 3.

(*g*) Hume, i. 432-3.

(*h*) Ibid. 433.

not, must run the risk of any force employed to suppress the tumult (*a*).

See *Breach of the Peace.—Injuries, Real.—Mischief, Malicious*,

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### ROGUE-MONEY.

THE freeholders of every county and stewartry in Scotland are directed to assess the county or stewartry in which their estates lie, at their meetings at any of their head courts yearly, in such sums as they judge necessary for defraying the charges of apprehending criminals, of subsisting them in prison till prosecution, and of prosecuting them, and not to be applied for any other purpose whatever; to be collected and accounted for by such person, and in such manner, as the freeholders from time to time appoint (*b*). From this fund justices get a proper compensation for expences debursed by them in bringing criminals to punishment. See *Arrest, &c.*

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### SALE.

SALE (questions with regard to which may occur before the justices under the small debt act) is a contract by which one person becomes bound to deliver a certain subject to another, with a view of transferring the property, for a price in current money (*c*).

#### I. WHAT MAY BE SOLD.

Things, the importation or use of which is absolutely prohibited, cannot be sold. In like manner, goods stolen or lost cannot be sold. And the owner of goods stolen or lost is entitled, without paying any thing, to recover them from a *bona fide* purchaser, even in a public market; or from a person by whom they have been *bona fide* received in gift or pawn. But

(*a*) Hume, i. 432.

(*c*) Erskine, iii. 3. 2.

(*b*) 11 Geo. I. c. 26, sect. 12.

it is otherwise, if goods, in the possession of a *bona fide* purchaser, or other holder, have been procured by his author from the true owner by swindling, or the like fraud; because, in this case, the true owner has consented to the transference of the property, though that consent was obtained by undue means.

In the sale of smuggled goods, as the statutes with regard to such goods provide that they may be forfeited in the hands of the buyer, at the instance even of the seller, damages are not due by the seller for non-delivery; and the buyer is not bound to receive them, nor to pay damages if he refuse to receive them (*a*). Where such goods have been delivered, in ordinary commerce, the seller has action for the price, although both parties knew the goods to be smuggled, and although they have been seized (*b*). If the purchaser was ignorant of the state of the goods, he is not bound to receive them or to keep them; and he has action of damages against the seller if they be seized. Where a foreign merchant sells goods abroad, which he knows are intended to be smuggled into this country, he, nevertheless, has action for the price (*c*). But where the contract is truly a contract to smuggle, or a part or continuation of such contract, no action of any kind can be sustained upon it (*d*); and where the foreign merchant is a native of this country, his participation in the smuggling will be inferred from circumstances comparatively slight (*e*). But although payment may be withheld in such cases, if once made it cannot be recovered, as the law sustains no action founded on a *pactum illicitum*.

## II. FORMATION OF CONTRACT.

This contract is perfected by consent alone; by the parties having finally agreed upon the different particulars of the contract (*f*). Earnest or arles is not unfrequently given by the buyer (which is imputed as part of the price, if it bear any pro-

(*a*) Scougal, &c. against Gilchrist, 16th November 1736; C. Home.—Cockburn against Grants, 2d November 1741; Kilk. p. 363; Elchies, Notes, p. 310.—Bell's Com. 4th edit. l. 236.

(*b*) Commissioners of Customs against Morison, 27th November 1723; Kames.—Wilkie against M'Neil, 6th November 1740; C. Home.

(*c*) Walker against Falconer, 27th February 1757.—More and Irvine against Steven, 13th November 1765.—Bell's Com. 4th edit. l. 236.

(*d*) Duncan against Thomson, 8th February 1776.—M'Lure and M'Cree against Paterson, 26th February 1779.—Attorney of Cullen and Company against Philp, 15th May 1793.

(*e*) Cantley against Robertson, 11th February 1790.—Young and Company against Imlach, 7th July 1790.—Reid and Parkinson against Macdonald and Elder, 15th May 1793.

(*f*) Erskine, iil. 3, 5, 6.

position to the whole sum (*a*)); but is not necessary. It is not always necessary that the parties have agreed upon the individual articles to be sold. A sale, for instance, of a score of sheep out of a certain flock, or even a sale of an article by sample, is binding on both parties. It is not always necessary that the amount of the price be fixed. It is sufficient, for instance, that, in the sale of grain, reference is made to the fiars; or that the sum is referred to a third party; or that the price of the article is fixed by custom, or by a known rate.

Though, in a question between buyer and seller, the contract is completed by consent, without delivery, yet the creditors of the seller, who has been allowed to retain possession, may attach the subject for their payment as his, though there have been no collusion between him and the buyer (*b*); and a posterior purchaser, first obtaining delivery, has a right to the subject, preferable to that of the prior purchaser.

The contract is not binding if either of the parties have been in a gross mistake (*c*), or have been fraudulently imposed upon in any essential particular.

The sale of moveable effects may be proved either by writing, by oath of party, or by witnesses.

### III. OBLIGATIONS OF PARTIES.

#### 1. *Of Seller.*

(1.) *To deliver.*—The seller is bound to deliver the subject as agreed upon, with all the fruits arising after the sale; or if, through his own fault, he be unable to do so, he is liable to the other party in damages.

A change of circumstances between the bargain and delivery, for instance, a rise or fall in the value of the article, from a supervenient law imposing a new tax, or the like, does not take away the seller's obligations to deliver, or the buyer's obligation to receive (*d*).

A bargain for a specific subject is not implemented by offering to deliver another of the same kind equally good (*e*).

Delivery may be either real, by putting the *ipsum corpus* into the possession, or under the power of the purchaser; or symbolical, if the thing sold do not admit of real delivery (*f*).

(*a*) Erskine, iii. 3. 5.

(*b*) Kinneil against Menzies, 18th November 1790.

(*c*) Sword against Sinclairs and Campbell, 8th August 1771.

(*d*) Maclelland against Adam and Mathie, 27th January 1795.

(*e*) Allason against Watson, 15th February 1757.

(*f*) Erskine, iii. 3. 8.

As to the time and place of delivery ; if there be any pact upon the point, it must be observed, otherwise the seller is bound to deliver instantly upon demand. But this is, in most cases, modified by the custom in particular kinds of trade.

The obligation to deliver depends on the readiness of the price ; for, on failure to pay, the seller is not bound to deliver, unless the bargain was upon credit or security ; nor even then, if the buyer's circumstances have become doubtful since the transaction, unless he will find caution for payment. This right of retention till caution, on the buyer's circumstances becoming suspicious, has been extended to the case where the goods are *in transitu*, out of the possession of the seller, but not yet really and fully in that of the buyer ; as in a waggon in the course of conveyance, or in a carrier's quarters, to lie till called for (*a*). A verbal order to the carrier is sufficient to prevent the buyer getting the goods. If the seller allow the subject to pass into the hands of the buyer without payment, he has no preference for the price ; but merely an ordinary personal claim.

In the ordinary case, if the subject perish before delivery, it perishes to the buyer (*b*). But it perishes to the seller in these cases : 1. If it perish through his fault, either by some positive act by him exposing it unnecessarily to danger, or by his being deficient in due care and diligence ; or if it perish through some latent insufficiency, or distemper, anterior to the contract ; or where he has been guilty of improper delay in delivering it ; but he is entitled to defer delivery, if the purchaser decline to pay the price. 2. If, by special agreement, any part of the risk was laid on the seller. Thus, if he became bound to deliver the subject at a certain place, the risk continues his till it be so delivered (*c*). 3. If a commodity be sold as a fungible, not as a *corpus*. A proprietor, for instance, who sells a certain quantity of his farm wheat, of a particular crop, to a merchant, without specifying any individual parcel, suffers the whole loss, if any part of that crop should be destroyed before delivery (*d*).

(2.) *To warrant*.—The seller is bound to warrant the subject to the buyer ; which is implied both in quality and title, if full price be paid (*e*).

(*a*) Dunlop against Scott, 22d February 1814.

(*b*) Bell's Com. 4th edit. l. 353.

(*c*) Milne against Miller, 1st February 1809.

(*d*) Erskine, iii. 3. 7.

(*e*) Lindsay against Wilson, 1771 ; Dict. iv. 255.

1. The seller, if the subject be evicted (taken from the buyer upon a right preferable to that of the seller,) must repay the price, and must make up to the buyer any consequent damage.

2. The seller must discharge all incumbrances. If the purchaser of moveables can shew any claim of a third party, which may probably prevail, as that the seller's right was only loan or deposit, the purchaser may, before delivery, throw up the bargain.

3. The subject must be sound and fit for the use intended. The cloth, for instance, must not be rotten. A person was found liable in damages for selling annual rye-grass seed, without explaining its nature to the purchaser, he being led to believe that he was purchasing perennial (*a*). It has been found that, both under implied warrandice that the thing is of the kind described, and under express warrandice that the thing is good and sound, the seller, though acting *optima fide*, is liable in damage for latent defects of which he was ignorant (*b*). It is clear that, if he knew of the defect, he is liable in damages. The warrandice may be extended to a particular use, if specified when the contract was formed; but where such use is uncommon, it must be specified. When the subject does not answer the warranty, the buyer may return it, even though there have been no wrong on the part of the seller. This warrandice extends only to faults which were latent at the time of the purchase. If the faults were palpable, or pointed out, the buyer is held to have disregarded them. Where the subject is sold much under the common market price, the warrandice will only cover faults which make it unfit for any use, or faults from adulteration, not communicated to the buyer. Even where the subject is expressly sold without warrandice, the seller is bound, if he have dishonestly adulterated or disguised the subject. The buyer must, within a reasonable time, inform the seller of the fault, and of his intention to return the goods (*c*). The time allowed depends on the fault being such as must come to light immediately upon delivery; or such as may remain undiscovered for a longer or a shorter time. Warrandice may apply, though the subject have been partly consumed before the fault was discovered, or have been sold again. The buyer must set the subject aside for the seller, after the discovery of the fault, and must not use it (*d*). In

(*a*) Adamson against Smith, 14th May 1799.

(*b*) Dickson and Company against Kincaid, 15th December 1808.

(*c*) Stevenson against Dalrymple, 28th June 1808.

(*d*) Stevenson, *supra*.



trying the subject, due regard must be had to the seller's interest. The buyer has no relief where he has merely made a rash or foolish bargain.

*2. Obligations of Buyer.*

(1.) *To receive.*—The buyer must receive the subject. He is not bound to receive it if the day appointed for delivery have passed, in those cases where delivery must be held an absolute condition of the bargain; as, if a farmer commission seed, which is not ready for delivery till the season for sowing is past. But, in the ordinary case, he seems bound to receive the subject after the appointed time; though, indeed, he is entitled to any damage sustained from the delay.

(2.) *To pay the price.*—The purchaser is bound to pay the price, and the expence profitably disbursed on the subject by the seller after the sale (a).

Goods commissioned at the lowest price are to be charged as at the date of receiving the order (b).

Where the subject perishes to the purchaser before delivery (see sect. To deliver) he is of course liable in the price, though the subject have perished (c); and still more if it have merely grown worse.

Where the subject has been delivered, the property passes, without any burden for the unpaid price; but if the parties agree that, if the price be not paid before a certain time, the sale shall be undone, or that the sale shall only be regarded as concluded upon payment of the price, this is binding between them (d), whatever it may be against third parties.

See *Compensation.—Retention.*

## SCHOOLS.

### I. PAROCHIAL SCHOOLS.

THIS matter, so far as regards parishes not entirely comprehended in royal boroughs, is regulated by 43 Geo. III. c. 54; which must be consulted when it is to be acted upon.

(a) Erskine, iii. 3. 9.

(b) Champion and Kirby against Milne, 14th January 1811.

(c) Erskine, iii. 3. 7.—Macdonald against Hutchison, 6th July 1744; C. Home.—Melville against Robertson, 31st January 1749; Kirk. p. 378-9.

(d) Macartney against Creditors of Macreddie, 26th November 1799.

Within three months after 11th June 1808, the salaries of the schoolmasters were to be fixed at a sum from 300 to 400 merks Scots, by the heritors of lands in the parish of L.100 Scots valued rent each in the cess-books, and the minister (*a*). In 25 years after, these heritors and the minister are to modify a new salary, according to the average price of oatmeal, to be ascertained by Exchequer, of the value of from one and a half to two chalders, and so on from 25 years to 25 years. In case of neglect, or wrong, by the heritors and minister, application is competent to the quarter-sessions, within three months after such meeting ought to have been held, or such determination has been made. In extensive or intersected districts, the heritors and minister may appoint two masters, with an increased allowance, subject to appeal to the quarter-sessions as to the division of the allowance.

Where there is not a proper school-house, a house for the schoolmaster, and a garden for him, containing at least one-fourth of a Scots acre, the heritors of the parish must provide them; or, in certain cases, an equivalent for the garden, by the authority of the quarter-sessions. In case of neglect or wrong, application is competent to the quarter-sessions. The quarter-sessions cannot alter the situation of a school-house formerly established (*b*).

## II. PRIVATE SCHOOLS.

During the commotions occasioned by the pretensions of the Stuarts to the crown, provision was made that no person should be concerned in teaching, or should teach in a private school, till it was registered in the county or borough books, with a certificate of the teacher having taken the oaths; or unless the teacher prayed for the King by name, and the royal family; or if he attended any disallowed episcopal meeting; and that, otherwise, he should be imprisoned six months by any two justices of the peace, or other judge competent, for the first offence, and be more severely punished by the Court of Justiciary for a subsequent offence. Provision was also made for two justices, or other judge competent, imprisoning three months for a first offence, and the Court of Justiciary punishing more severely for a subsequent offence, any person sending a child under his care to a private school not allowed (*c*).

(*a*) It has been found competent for the heritors, &c. to meet more than three months after passing the act.—*Miller against Jackson*, 9th July 1808.

(*b*) *Dawson against Allardyce*, 18th February 1809.

(*c*) 19 Geo. II. c. 39, sect. 21, 22.—22 Geo. II. c. 34, sect. 12.

But it is believed that there has not for a long time been a prosecution for non-compliance with those provisions.

See *Oaths.—Nonconformists..*

## SCOTS MONEY.

SEVERAL sums in the older acts of Parliament being expressed in *Scots* money, it seems proper to mention, that a sum in Scots money is a twelfth part of the same denomination of sterling money.

Scots.		Sterling.
A doyt, ( <i>a</i> ) or penny, is	- -	L.0 0 0 $\frac{1}{12}$
A bodle, ( <i>b</i> ) or twopence,	- - -	0 0 0 $\frac{2}{12}$
A plack, ( <i>c</i> ) groat, or fourpence,	- - -	0 0 0 $\frac{4}{12}$
A shilling,	- - -	0 0 1
A merk, or 13s. 4d. (two thirds of a pound)		0 1 1 $\frac{4}{12}$
A pound,	- - -	0 1 8

It is easy to make the necessary multiplication or division for any amount ; or for converting Sterling money into Scots, when there is occasion.

## SEAMEN.

### I. SEAMEN IN THE ROYAL NAVY.

#### 1. *Impressing.*

SOME matters with regard to impressing seamen are specially committed to justices of the peace ; and sometimes they are required, by the Admiralty impress warrants, to co-operate with the officers of the navy to whom the execution of those warrants is committed. But as the subject concerns few justices, a very short notice of it is sufficient.

All persons using the sea may, when necessary, be impressed by authority of impress warrants from the Admiralty ; under certain exceptions.

(*a*) Jamieson's Etymological Dictionary, vocer.

(*b*) Ibid.

(*c*) Ibid.

(1.) *General Exemptions*.—Persons not between eighteen and fifty-five years, are exempted from the impress (*a*).

All persons are exempted during two years after beginning to use the sea (*b*); even ship-carpenters (*c*).

Apprentices to the sea service are by certain acts of Parliament exempted during three years from the date of their indenture (*d*), unless they formerly used the sea (*e*). They must produce their indentures, and bring reasonable proof of not having before used the sea (*f*). By a later act apprentices bound under seventeen years of age, by indenture, for at least four years, and whose indenture is duly enrolled with the collector and comptroller, at the custom-house of the port from which the vessel first clears out after the execution of the indenture, are exempted till the age of twenty-one years, provided they be regularly serving their time either with their first master or ship owner, or with some other master or ship-owner, to whom the indentures have been regularly transferred, and if the indenture be enrolled with the collector or comptroller of the port (*g*).

Seamen who have *bona fide* retired from the sea service are exempted (*h*). A justice of the peace has been subjected in damages for impressing such, with aggravating circumstances (*i*).

Foreigners in British ships are exempted (*j*).

(2.) *Particular Exemptions*.—*Fisheries*. 1st, Masters of fishing-vessels, having at least one apprentice under sixteen years, bound for five years, and fishing, are exempted. 2. Such apprentices, not exceeding eight, for fifty tons and upwards; seven for thirty-five tons to fifty; six for thirty to thirty-five; four for under thirty; are exempted while serving, and not twenty years of age. 3d, One mariner for fishing-vessels of ten tons and upwards, besides the master and apprentices, is exempted while employed. 4th, Any landmen between eighteen and thirty years, in fishing-vessels of ten tons or upwards, are exempted for two years after going to sea, and to the end of the voyage (*k*). On affidavit before a justice, by any person of these four classes, specifying particulars, being sent to the Admiralty, a protection is granted (*l*). If the im-

(a) 13 Geo. II. c. 17, sect. 1.

(b) Sect. 2.—Chalmers against Napier, 6th February 1762.

(c) Chalmers, *supra*.

(d) 2 and 3 Anne, c. 6, sect. 15.—13 Geo. II. c. 17.

(e) 4 Anne, c. 19, sect. 17.

(f) Chalmers, *supra*.

(g) 4 Geo. IV. c. 25, sect. 2, 4.—6 Geo. IV. c. 107, sect. 138.

(h) Nash against Wyllie, 6th February 1810.

(i) M'Arthur against Campbell, 9th December 1808; Buchanan's Reports.

(j) 13 Geo. II. c. 17, sect. 1.

(k) 50 Geo. III. c. 108, sect. 2.

(l) Ibid. sect. 2.

press officer or commanding officer do not release the person producing such protection, &c. he forfeits L.20 to such person, or to his master if an apprentice (*a*): to be recovered before a justice of the peace, on confession, or oath of one witness; to be levied by distress and sale in five days, if not paid in twenty-four hours; failing distress, the offender to be committed to the house of correction to hard labour for a month, unless sooner paid (*b*). Prosecutions under this act must be brought within three months (*c*). Appeal is competent to the quarter sessions, on finding surety for double the penalty, and giving eight days notice (*d*).

*Deep Sea White Herring Fishery.*—Ten men, or eight men and two boys, not under thirteen years of age, to the end of the voyage, for a fishing vessel less than sixty tons, not less than forty-five; ten men for sixty tons; eleven for more than sixty to seventy; and one more for every ten tons above seventy; are exempted (*e*).

*Whale Fishery.*—On the northern whale fishery (*i. e.* to the north of the equator, in the Greenland seas, or in Davis's Straits, or the adjacent seas), six harpooners, six line managers, and six boat-steerers, for every whale ship of 300 tons, and in proportion for smaller tonnage, one harpooner, one line manager, and one boat-steerer for every fifty tons, whose names (distinguishing the capacity in which they are to act) are contained in a list rendered on oath by the owner to the collector of the customs of the port from which the ship is to sail, are exempted from the impress; and while not employed on such fishery, may sail in the coal or coasting trade, on finding security to the satisfaction of the commissioners of the customs, to proceed to the Greenland seas or Davis's Straits, for the whale fishery, next season: and eighteen common seamen for 400 tons, and in proportion for smaller tonnage, whose names are entered in a list as above, and who find security as above to proceed to the fishing, and who do proceed, are exempted from 1st February till the expiration of the season for the fishery, and the end of the voyage home (*f*).

On the Southern, or South Sea whale fishery (*i. e.* to the south of the Equator), all the harpooners, line managers, and boat steerers, while belonging to, and employed on board a vessel engaged in that fishery, are exempted from the impress (*g*). And apprentices on that fishery who have not com-

(*a*) 50 Geo. III. c. 108, sect. 4.

(*b*) Sect. 7.

(*c*) Sect. 8.

(*d*) Sect. 12.

(*e*) 48 Geo. III. c. 110, sect. 13, 27.—51 Geo. III. c. 101.—52 Geo. III. c. 153—made perpetual by 55 Geo. III. c. 94.

(*f*) 26 Geo. III. c. 41, sect. 17.—32 Geo. III. c. 22, sect. 5.—42 Geo. III. c. 22, sect. 2.—55 Geo. III. c. 39.

(*g*) 35 Geo. III. c. 92, sect. 34.

pleted two voyages, and who are not 21 years of age, are exempted (*a*).

*Coal Trade.*—One seaman is exempted for every hundred tons, not exceeding three hundred, besides the master, master's mate, and carpenter; under a penalty of L.10 for each improperly impressed, to be recovered in any of the King's courts of record (*b*).

*Masters and Mates.*—It appears to have been at one time thought that masters of merchant vessels, and first mates of merchant vessels of 50 tons burden or upwards, had established by usage a legal right of exemption from the impress (*c*). The contrary, however, has subsequently been found with regard to mates (*d*); and that decision seems to afford some ground for an unfavourable inference with regard to masters. But the Admiralty instructions issued with the press warrants have for a long time always directed the impress officers not to impress masters and such mates. And, by a subsequent statute, the first mate of every vessel exceeding the burden of eighty tons, and the first and second mates of every vessel exceeding the burden of three hundred tons, are exempted from impress, provided they are regularly entered as such upon the articles between the master, seamen, and mariners (*e*). And that statute affords ground for inference that the legislature considered masters as exempted.

Sometimes the impress officer is directed by the Admiralty instructions to pass certain other persons besides those enjoying legal exemptions, and masters and mates.

Frequently special conditions are prescribed by the regulating officer for persons protected. But such conditions cannot at all affect persons enjoying legal exemptions. And even with regard to persons deriving their exemptions solely from the Admiralty instructions, such conditions will receive effect only in so far as reasonable in themselves, and agreeable to the instructions. Thus, it has been found that, under the instructions not to impress mates of vessels of 50 tons and upwards, mates of such vessels are entitled to exemption (contrary to a condition prescribed by a regulating officer), although not on board, if actually employed at the time in the service of the vessel (*f*).

Masters and mates forfeit their exemption if they smuggle

(*a*) 45 Geo. III. c. 96, sect. 5—48 Geo. III. c. 124, sect. 5.

(*b*) 2 and 3 Anne, c. 6, sect. 20.

(*c*) Napier against Brownings, 19th January 1781.

(*d*) Smith against Jeffrey and others, 24th January 1817.

(*e*) 4 Geo. IV. c. 25, sect. 7.

(*f*) Smith, *supra*.

habitually; but it has been thought that they do not (unless specially so provided by a revenue law for the time) if they be merely guilty of single acts of smuggling, and usually carry on lawful commerce (*a*).

A person illegally impressed may obtain enlargement by an order from the Court of Session.

*2. Provisions regarding seamen of the navy when entered.*

*Civil power and courts.*—A seaman of the navy cannot be taken out of the service by any process or execution, except for some criminal cause; unless for a just cause of action, and unless the plaintiff, or some person for him, make affidavit before a judge of the court out of which the process issues, or before some person authorized to take affidavits in such courts, that the cause of action amounts to L.20; a memorandum of which oath must be marked on the back of the process or writ, without fee. A seaman arrested otherwise must be discharged by the court without fee, on complaint by himself or by his superior officer; and the complainer recovers costs, which he may make effectual in the same way that the person applying for the process would have recovered costs if they had been awarded to him (*b*). But a plaintiff, on giving notice to the seaman personally, or leaving it at the place where he resided before entering into the navy, may have judgment and execution other than against the person of the seaman (*c*).

When any petty officer or seaman of the navy is arrested by any sheriff or other officer by any civil process, or upon any warrant for any alleged criminal offence, and is thereupon taken from the sea service, &c. the sheriff, gaoler, or other officer, &c. must not discharge him on payment of the debt, &c. or for want of prosecution, or upon acquittal of the charge, or by consent of the opposite party, or upon giving any security, &c.; or in case of conviction, after expiration of the term of imprisonment; but must, with all convenient speed, deliver him to the commander in chief of some of his Majesty's ships, or some commissioned officer authorized to raise seamen, or some principal regulating officer of the impress, which ever is nearest to the place; and such commander in chief, &c. must deliver to such sheriff, &c. a certificate directed to the treasurer of the navy, specifying the receipt of such petty officer, &c. and the places from which he is conveyed; upon which the treasurer

(*a*) Napier against Brownings, 19th January 1781.—Brodie, Ellis, and Herd, against Napier, 6th February 1782.

(*b*) 31 Geo. II. c. 10, sect. 28.

(*c*) Ibid. Sect. 29.

of the navy is to pay two shillings per mile (*a*). When one sheriff or other officer has occasion to transfer the petty officer, &c. to another sheriff or other officer, he is to certify in writing on the back of the writ, or other proceeding, that such person is a petty officer, &c. as the case may be, and liable to be detained for the navy (*b*). Sheriffs, &c. neglecting to convey such petty officer or seaman, as above directed, and detaining them in custody longer than one day for every forty miles which there is occasion to travel, are liable to action at their suits (*c*). Sheriffs, &c. allowing such petty officer, &c. to escape, forfeit L.100, to be recovered in the Court of Exchequer in Scotland (*d*).

It has been found that a master, who reclaims his apprentice from the sea service, is not bound, by the statute 44 Geo. III. c. 13, now cited, to find caution for the apprentice returning to the navy on the expiry of his indentures; as the act only relates to persons taken from the navy for civil debts or process, or for criminal offences (*e*).

*Pay to family, &c.*—Provision is made to enable petty officers of the navy, seamen, non-commissioned officers of marines, marines, boatswains, gunners, and carpenters, in the navy, to allot part of their pay to their wives, mothers, or children (*f*). One or two of the particulars require the authority of justices of the peace. Where the wife, to whom her husband has allotted a portion of his pay, dies, leaving a child or children under 14 years of age, the minister and elders of the parish, in which she resided at the time of her death, certify to the commissioners of the navy the fact, and their intention to appoint a proper person to receive the allowance for behoof of the family, and transmit to the navy board the triplicate of a certain order of the husband. If the seaman be still alive, the commissioners send three certificates to the minister and elders to fill up the blanks for the number and ages of the children, &c. who apply to two of the justices of the county in which the parish lies, to attest the truth of the statement made as to the family of the seaman, and their approbation of the person suggested as fit to receive the allowance (*g*). If any regulating officer, or commander of any vessel, unnecessarily neglect or delay to transmit to the navy board the lists of petty officers, &c. who have allotted pay for their families, as men-

(*a*) 44 Geo. III. c. 13, sect. 1.

(*c*) Ibid. sect. 3.

(*e*) Smith, 23d June 1814.

(*f*) 35 Geo. III. c. 28.—46 Geo. III. c. 127.

(*g*) 35 Geo. III. c. 28, sect. 6.

(*b*) Ibid. sect. 2.

(*d*) Ibid. sect. 4.



tioned in the act, or to transmit the declarations and orders of such petty officer, &c. authorizing payments, as mentioned in the act, he forfeits L.50, to be recovered as penalties under the laws of customs and excise, and to be paid to the person suing (a). (See *Excise, &c.*) If the public officer, by whom an allotment of wages has been directed to be paid, do not, within two days, acknowledge receipt of a letter from the commissioners of the navy, communicating the death of a sailor, &c. and directing him to stop further payments to the family, he forfeits L.20, to be recovered and applied in the same manner (b). Every person withholding the smallest fraction of wages allotted to be paid under this act, on any pretence, forfeits L.20, to be recovered and applied in the same manner (c). The forging of any of the declarations, orders, certificates, or receipts, or using such as genuine, knowing them to be forged, in order to receive wages allotted to the families of seamen, &c. is a capital crime (d), for which, of course, justices cannot try; but may take the steps preparatory to trial. See *Arrest, &c.*

*Personating seamen, forging letters, &c.*—The personating of seamen of the navy, their executors, or administrators, or forging any letter, ticket, latter will, power of attorney, &c. or knowingly uttering such, in order to receive wages, prize-money, &c. due to any seaman, or his executors, &c. are made capital by statute (e). The personating of any person entitled to an out-pension from Greenwich Hospital, in order to receive such pension, or procuring any other person to do so, which was at one time made a capital offence (f), is now subjected to an arbitrary punishment, which may amount to transportation for life (g). Justices of the peace may take the steps preparatory to trial for these offences. See *Arrest, &c.*

## II. SEAMEN IN THE MERCHANT AND FISHING SERVICE.

### 1. *Merchant service.*

Masters of ships in the merchant service, whether the coasting trade or otherwise, must not proceed on a voyage without a signed agreement, in writing, for wages, with each mariner, except apprentices, otherwise they incur a penalty of L.5 sterling for each mariner with whom the proper agreement has not been made, to be decerned for on conviction before any one

(a) 35 Geo. III. c. 28, sect. 13.

(b) *Ibid.* sect. 18.

(c) *Ibid.* sect. 25.

(d) *Ibid.* sect. 30.

(e) 31 Geo. II. c. 10, sect. 24.—9 Geo. III. c. 30, sect. 6.

(f) 3 Geo. III. c. 16.

(g) 4 Geo. IV. c. 46, sect. 1.

justice of the peace, by the oath of one witness, to the use of Greenwich Hospital, and to be recovered by distress; or, if it cannot be recovered in that manner, the offender to be committed to jail till it be paid (*a*).

If any mariner, after he has entered into an agreement, refuse to proceed on the voyage intended, any justice of the peace of the jurisdiction must, on complaint by the master, owner, or other person having charge of the vessel, issue a warrant to apprehend the mariner; and, if he do not shew sufficient reason for his refusal, must commit him to the house of correction, to hard labour, for any time not more than thirty days, nor less than fourteen (*b*).

Those provisions, with regard both to masters and mariners, do not extend to vessels other than such as are of 100 tons burthen, or upwards; nor to these, unless they go to the open sea; nor do they debar any seamen from entering into the navy (*c*).

If any of the crew of any registered ship desert from her when absent from this country, contrary to his agreement, he forfeits his wages, not only for that ship, but for any ship in which he may have returned to this country (*d*). But this does not prevent seamen from entering into the royal navy, or subject them to forfeiture of wages for doing so (*e*).

## 2. *Fishing service.*

If any seaman or mariner, after entering into an agreement for the performance of a fishing voyage, refuse or neglect to proceed in it, he forfeits L.5 for each offence, on prosecution within three months; and on complaint to any justice, by any person having charge of the vessel, the justice must grant warrant to apprehend him; and if he do not give good reason for refusal, or do not pay the penalty, the justice must commit him to the house of correction, to hard labour, from fourteen to thirty days (*f*).

The master or owner of any vessel knowingly enticing an apprentice, seaman, or landman, of any fishing vessel, &c. forfeits, for each offence, L.20, to be recovered and applied as penalties, &c. for impressing, &c. the four classes of persons connected with the fisheries, who are exempted from the impress (as above mentioned) under 50 Geo. III. c. 108, cited (*g*).

One half of penalties under this act (unless otherwise pro-

(*a*) 2 Geo. II. c. 36.—31 Geo. III. c. 30, sect. 1.

(*b*) 45 Geo. III. c. 81.

(*c*) 31 Geo. III. c. 30, sect. 10.

(*d*) 4 Geo. IV. c. 26, sect. 2.

(*e*) Ibid. sect. 12.

(*f*) 50 Geo. III. c. 108, sect. 5.

(*g*) Ibid. sect. 6.

vided) goes to the prosecutor, the other half to Greenwich Hospital (*a*).

For the capital crime of encouraging mutiny by sailors of the navy, see *Soldiers*, sect. Enlisting; Note. For seamen exercising trades in burghs, see *Soldiers*, sect. Trades.

## SEARCH WARRANT.

It is sometimes necessary to search houses for stolen goods, forged documents, or the like. This can only be done upon a written warrant (*b*). The law with regard to search warrants is the same as that with regard to warrants to arrest a person accused of a crime, so far as applicable (see *Arrest*, &c. sect. Arrest); in particular, the house which is to be searched ought to be described, and also the articles for which search is to be made.

Where stolen goods are found, they must be properly marked, and kept in safe custody, with a view to a trial for theft. (See *Arrest*, &c. sect. Precognition.)

Although a seizure before trial may take place at common law, in reference to a common law offence, *e. g.* theft, forgery, or the like, it has been found that, where a statute makes certain provisions with regard to articles of manufacture or the like, under the sanction of forfeiture, that does not authorize seizure before trial, unless it be specially authorized by the statute (*c*).

## SEDITION.

### I. SEDITION AT COMMON LAW.

SEDITION comprehends all those practices, whether by deed, word, or writing, or of whatever kind, which are suited and intended to disturb the tranquillity of the state, to produce

(*a*) 50 Geo. III. c. 108, sect. 11.

(*b*) 2 Hales's Hist. 151.

(*c*) Anderson and Company against Campbell and others, 28th February 1811.—Mitchell and Company against Meek, 29th May 1818.

public trouble and commotion, and to move the subjects to the dislike, resistance, or subversion of the established government and laws, or settled frame and order of things (*a*) ; as to maintain, openly and advisedly, that all monarchy is an usurpation ; that government is overrun with corruptions which the people ought not longer to endure ; that the people ought to meet of themselves and choose a triennial parliament (*b*) ; or that they ought to meet in a body, and compel the legislature to concede any thing which may be popular at the time ; or that church patronage is beyond the power of parliament, and contrary to the rights of the people, and that a certain plan ought to be followed for abolishing it, and placing the election of the clergy in the hands of the people ; and the like (*c*).

It might be repressed with the highest arbitrary punishment at common law (*d*). But by act of Parliament, special punishments have been prescribed for this offence, along with *Leasing-making* and *Blasphemy*, (See *Leasing-making*, where the punishments, and the duty of justices in such cases, are noticed.)

## II. SEDITIOUS MEETINGS, &c. BY STATUTE.

### 1. *Unlawful Societies.*

The societies of *United Englishmen*, *United Scotsmen*, *United Irishmen*, and *United Britons*, and the *London Corresponding Society*, and all other societies called corresponding societies, of any other place, are prohibited as unlawful (*e*).

All societies are unlawful, the members of which are required to take any oath unlawful by 37 Geo. III. c. 123 (see *Oaths*, sect. Unlawful) or any oath not authorized by law, or which have any members, committees, &c. not known to the society at large, or the names of all the members of which are not entered in regular books, or which act in separate or distinct branches ; and members of such, and persons corresponding with, or supporting them, are guilty of an unlawful combination (*f*). This provision does not extend to any declaration to be assented to by the members of any society, if the form of it be approved of by two justices of the peace for the place ; to be effectual only till the next general quarter sessions, unless then confirmed (*g*).

The act cited does not extend to regular lodges of free-masons, which have usually been held before passing it (*h*).

(*a*) Hume, i. 544.

(*d*) Hume, i. 546.

(*f*) Ibid. sect. 2.

(*h*) Ibid. sect. 3.

(*b*) Ibid.

(*c*) Ibid.—Burnett, Sedition.

(*e*) 39 Geo. III. c. 79, sect. 1.

(*g*) 39 Geo. III. c. 79, sect. 3.

But this exemption is not enjoyed unless two members of each lodge claiming it, certify upon oath, before any justice of the peace, or other magistrate, that such lodge has, before passing the act, been usually held as a lodge of freemasons, and according to the rules prevailing among such lodges in this kingdom; which certificate, attested by such magistrate, and subscribed by the persons certifying, must, within two months after passing the act, be deposited with the clerk of the peace for the place where such lodge is usually held; and unless the name of the lodge, the places and times of its meetings, and the names and descriptions of all its members, be registered with the clerk of the peace, within two months after passing the acts, and on or before 25th March yearly (*a*). The clerk of the peace is to lay such certificate and registry, once a-year, before the general sessions, who may order any lodge to be discontinued, if likely to be injurious to the public peace (*b*).

Persons guilty of the combinations prohibited by this act, may be proceeded against either summarily before one justice of the peace for the place where they happen to be, or by indictment before the Court of Justiciary. A person convicted by oath of one witness, is to be committed by the justice to the common jail, or house of correction of the place, for three months, or to forfeit L.20, as the justice sees fit. If the sum be not immediately paid, the justice is to levy it, with expenses, by distress and sale; and, for want of sufficient distress, is to commit the offender to the common jail or house of correction of the place, not exceeding three calendar months (*c*). The justice may mitigate the punishment (whether imprisonment or penalty) to not less than a third (*d*). Persons prosecuted either before a justice, or indicted, are not liable to other prosecution for the same offence (*e*). Offenders may be prosecuted, as formerly, if not prosecuted under this act (*f*).

Any person knowingly permitting any meeting of any society declared unlawful in this act, or of any part of it, to be held in his house or apartment, for the first offence, forfeits L.5; and for any offence committed after conviction of a first offence, is to be punished as an unlawful combiner under this act (*g*).

Any two justices of the peace for the place, upon evidence on oath, that an unlawful combination, or any meeting for a

(*a*) 30 Geo. III. c. 79, sect. 6.

(*b*) Ibid. sect. 7.

(*c*) Ibid. sect. 8.

(*d*) Ibid. sect. 9.

(*e*) Ibid. sect. 10.

(*f*) Ibid. sect. 11.

(*g*) Ibid. sect. 13.

sedition purpose, has been held after passing this act, at any licensed alehouse, may declare the license forfeited (*a*).

By a later act, all clubs or societies, having for their object the division of the land, and the extinction of the funded property, are prohibited (*b*). All societies taking oaths declared unlawful by 37 Geo. III. c. 125, or 52 Geo. III. c. 104 (see *Oath*, sect. Unlawful) or not required or authorised by law, or taking tests or declarations not required or authorised by law, or appointing delegates to meet with other societies, or to induce persons to become members, are declared unlawful confederacies, under 39 Geo. III. c. 79; and every person becoming a member of such societies, or abetting them by contributing money, or otherwise, may be proceeded against under that act (*c*). This act does not extend to freemasons' lodges, nor to declarations approved by two justices, nor to meetings or societies for charitable purposes (*d*); nor does the act 39 Geo. III. c. 79 (*e*).

Persons permitting such unlawful societies in any house, building, or other place belonging to them, forfeit L.5 for the first offence, and for any offence after a first conviction, are to be punished as guilty of an unlawful confederacy under this act (*f*). Licences of public houses where unlawful societies are held are to be forfeited by two justices (*g*).

Penalties not exceeding L.20 are to be recovered before a justice (higher penalties are recoverable before the Court of Session) and to be levied by distress, and, failing distress, by imprisonment from three to six months; but are not to be sued for after three months from the offence. Half of the penalties go to the informer, half to the King (*h*). The Lord Advocate may stay proceedings (*i*).

Actions against justices, &c. for acting under this act, are limited to three months (*j*).

This act does not affect other provisions made by law for punishing such offences, &c. (*k*).

See *Treason—Leasing making*.

## 2. *Printers, Letter Founders, &c.*

Every person having a printing press, or types for printing,

(*a*) 39 Geo. III. c. 79, sect. 14.—Certain regulations were contained in sect. 15–22, with regard to places for lecturing, debating, reading books, papers, newspapers, &c. where money is paid for admission; but these related to 36 Geo. III. c. 8, which has expired.

(*b*) 37 Geo. III. c. 19, sect. 24.

(*c*) Sect. 25.

(*d*) Sect. 26.

(*e*) Sect. 27.

(*f*) Sect. 28.

(*g*) Sect. 29.

(*h*) Sect. 31.

(*i*) Sect. 37.

(*j*) Sect. 23.

(*k*) Sect. 35, 36.

must give notice of it (in a form prescribed in the act) to the clerk of the peace of the place where they are intended to be used, who grants a certificate (in a form prescribed) and files the notice, and transmits an attested copy to the secretary of state. Persons keeping presses or types, without notice, or using them in any place not expressed in the notice, forfeit L.20 (*a*). The act cited does not extend to the King's printers, or to the English universities (*b*).

Letter founders and printing-press makers must give notice (in a form prescribed in the act) to the clerk of the peace, who grants a certificate (in a form also prescribed) and files the notice, and transmits an attested copy to the secretary of state. Persons carrying on such business without such notice forfeit L.20 (*c*). Such persons must keep an account, in writing, of the persons to whom such types or presses are sold, and must produce such to any justice of the peace demanding, in writing, to see them. On failure in either particular, they forfeit L.20 for each offence (*d*).

The name and abode of the printer must be printed on every paper or book, on the first and last leaf if more than one. Printers omitting to do so, and persons dispersing papers without such name and place of abode, forfeit L.20 (*e*). But persons are not liable for more than 25 forfeitures, or penalties, for any number of copies of the same book or paper printed, published, dispersed, &c. without the name and abode of the printer (*f*). The name and abode of the printer are not required on bank notes, bills, securities for money, bills of lading, policies of insurance, letters of attorney, deeds, or agreements, or any transfers of stocks of a public company, or receipts, or proceedings in courts, or papers printed by authority of any public board, or public officer (*g*); nor on papers printed by authority of Parliament, for their use (*h*); nor on impressions of engravings: nor on advertisements of the names and addresses of tradesmen, or of the sales of goods, &c. (*i*). Any person in whose presence any printed paper, not having the printer's name and abode, or having a fictitious name and abode printed on it, is sold or offered to sale, or delivered, or offered *gratis*, or exposed to public view, may seize the person selling, offering, exposing, &c. and convey him before a justice of the peace for the place, or deliver him to a constable to be so conveyed, that the justice may determine whether the person has been guilty of an offence against this act (*j*).

(*a*) 39 Geo. III. c. 79, sect. 23.

(*b*) Sect. 24.

(*c*) Sect. 25.

(*d*) Sect. 26.

(*e*) Sect. 27.

(*f*) 51 Geo. III. c. 65, sect. 1.

(*g*) Sect. 3.

(*h*) 30 Geo. III. c. 79, sect. 28.

(*i*) Sect. 31.

(*j*) Sect. 30.

Printers must keep a copy of every paper which they print, and must write on it the name and abode of their employer. If they neglect to do so, or to keep such copy so marked for six months, or to shew it to any justice of the peace requiring it within six months, they forfeit L.20 for each offence (*a*).

A justice of the peace for the place, on having cause to suspect, from information on oath, that any press or types are illegally used, may grant warrant for searching the place at any hour in the day time, and carrying off such press, types, all things belonging to it, and all printed papers found in the place (*b*).

Any penalty not exceeding L.20, and for which no other mode of recovery is appointed, may be recovered in a summary manner before a justice of the peace for the place in which it was incurred, or in which the offender happens to be. If not immediately paid, it is to be levied on warrant of the justice, by distress and sale, with the expences of such distress and sale. If there be not sufficient distress, the justice is to commit the offender to the common gaol, or house of correction of the place, not exceeding six months, nor less than three (*c*). Prosecutions must be brought within three months (*d*). Justices may mitigate penalties to not less than L.5, besides costs (*e*). Half of the penalty goes to the informer, half to the king (*f*). Appeal is competent to the quarter sessions held next after 20 days from the conviction, on six days notice to the prosecutor. The quarter sessions may determine the case, or may adjourn to the next quarter sessions. They may mitigate, as the justices may. They may order money to be returned. They may award costs (*g*).

Action must be brought against any justice of the peace, peace officer, or other person, for any thing done under this act, within three months after the fact. If judgment be given for the defendant, he is to have double costs (*h*).

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## SERVANT.

JUSTICES of the PEACE have long been in the use of judging in questions on the contract between master and servant,

(*a*) 30 Geo. III. c. 79, sect. 29.

(*c*) Sect. 35.

(*f*) 39 Geo. III. c. 79, sect. 36.

(*h*) 30 Geo. III. c. 79, sect. 37.

(*b*) Sect. 33.

(*e*) 51 Geo. III. c. 65, sect. 2.

(*g*) 51 Geo. III. c. 65, sect. 4.



whether for business or for domestic purposes, and independently of the small debt act. Sometimes the action is brought under that act, being more expeditious and less expensive (*a*).

### I. FORMATION OF CONTRACT.

The two parties form a mutual agreement about the work to be done, the period of service, the remuneration to be given, and any other particulars which they may think necessary. Those particulars, however, are, most of them at least, generally left to be regulated by the common custom in the place, and in the kind of service.

Where the party engaging as a servant is a pupil, his father, or, if his father be dead, his tutors, must consent for him, as he himself cannot consent. When he is a minor *pubes*, his father, if alive, or his curators, if he have such, must concur with him; failing both father and curators, he can bind himself. (See *Children.—Minors*.)

Where, as is commonly the case, the engagement is entered into for a period not exceeding one year, it may be done verbally, and admits of proof by the oath of party, or by witnesses. If the period be longer than a year, the agreement must be in writing; otherwise neither party is bound. In such a case, when a dispute occurs, while nothing has been done in consequence of what has passed between the parties, the agreement must be a regular and probative deed (see *Proof*, sect. Writing;) and any defect in this particular cannot be supplied even by the oath of party. But if, on the other hand, the parties have entered into the fulfilment of their engagement, upon an irregular writing, or where, in any other respect, matters are not entire, they are bound by such writing (*b*).

In hiring a servant, at least a domestic servant, it is usual to give arles, or earnest; but this is not necessary to the validity of the agreement. If really concluded, it is binding without that form.

When concluded, whether arles have been given or not, neither party of course can resile, upon forfeiting the arles, or upon any other condition, without the consent of the other party (*c*).

### II. OBLIGATIONS OF PARTIES.

The obligations of the parties depend in a great measure upon the particular bargain which they make, and upon the

(*a*) For certain statutes relative to servants, which appear not to extend to Scotland, see *Apprentices*, Foot note.

(*b*) Kilkerran, *Proof*, No. 10. (*c*) Hutcheson's J. P. 3d edit. ii. 161.

custom of the place and the species of service. But there are some obligations which seem to be of a general nature.

### 1. *Of Servant.*

The following seem to be the general obligations of the servant.

(1.) *To enter.*—The servant must enter into his service at the agreed time; otherwise, like every other person failing to fulfil a contract, he will be subjected in damages to his master. (See *Imprisonment*.) The amount of the damages will depend upon the circumstances of the case. The servant, of course, cannot send a substitute.

The term of entry usually understood, where there has been no explicit agreement to the contrary, is the next term of Whitsunday (legally 15th May) or Martinmas (legally 11th November (a)).

(2.) *To continue.*—The servant must continue in his service during the agreed period.

The period generally understood, failing special agreement, is six months; that is, till the next term of Whitsunday or Martinmas. This is the common period in domestic service. It is not sufficient evidence of an engagement for a longer period, that the parties settled the wages at so much a year. A steward or overseer, especially when he comes from a distance, is held to have been engaged for a year. A ploughman engaging at Whitsunday is held to have been engaged for a year; Whitsunday being the common term of entry of those persons.

If the servant, without good cause, do not continue during the agreed period, he forfeits his wages, and may, in the circumstances of the case, be subjected in damages. (See *Imprisonment*.)

If a female servant marry, her husband seems entitled to have her society immediately, though before the term; but probably, in that case, he may be liable in damages.

At common law, a man servant must serve out his time,

(a) *Note.*—For the general date of Whitsunday and Martinmas, in civil questions, see *Tack*, sect. Obligations of Landlord: Note. The only exception, at all regarding servants, from the general provision there noticed in favour of the same *nominal* days, is, that markets and fairs for the sale of goods, for the hiring of servants, or for any other purpose, shall take place on the same *natural* days; that is, eleven *nominal* days later; but this does not affect the time for entering upon service; so that 15th May ought to be observed as Whitsunday, and 11th November as Martinmas. In some parts of the country, however, Old Whitsunday, 26th May, and Old Martinmas, 22d November, are still observed in the case of certain kinds of servants, particularly farm-servants.

though he have enlisted (*a*) ; but, by the annual mutiny act passed for some years, this has been altered ; and the servant has at the same time been declared entitled to wages for the time he has served, to be modified by the magistrate. (See *Soldiers*, sect. Enlisting.)

If the servant be prevented for a short time, by sickness, or other the like accident not imputable to him, from implementing his part of the contract, he is nevertheless entitled to full wages. It does not seem to be fixed what shall be held a short period. In one case, a farmer was found not entitled to deduct any part of the wages of a servant hired for a year, on account of his having been disabled from work by sickness during eleven weeks of that year (*b*). But this case was decided on its own circumstances, and is not understood to have fixed a rule. Some have thought that, where the period is considerable, so as to occasion inconvenience and expence, there ought perhaps to be an abatement : but, on the other hand, Mr Erskine lays down the servant's title to full wages, though unavoidably prevented from serving, in general terms (*c*), without excepting a considerable period ; and in a recent case, an opinion in equally general terms, as to compensation for a period of sickness, was expressed from the Bench (*d*) ; on the ground, probably, that servants, particularly menial servants, are not hired to do particular quantities of work, but to render general respect and submission, and to make a general exertion in their departments, and that therefore masters must be satisfied with the utmost which they can do in existing circumstances. If a man be disabled in the course of his service, and in consequence of doing his duty, as where a groom is kicked by his master's horse, he is entitled to full wages till the covenanted issue of the service, however remote.

But, to oblige the servant to continue during the covenanted period, the master must reside, or carry on business, in a place upon the whole not very remote from that which the servant must be supposed to have had in view at contracting. This holds very strongly in the case of those kinds of servants who must be held to have engaged, not so much to a person, as to a particular place and set of operations. Thus, a ploughman could not be compelled to serve far from the place at which he understood he was to serve ; and a Scots servant who had

(*a*) Clerk against Murchison, 19th January 1799.—Macdonnell against Dixon, 1st March 1806.

(*b*) White against Baillie, 29th November 1794.

(*c*) Erskine, iii. 3. 16.

(*d*) Maclean against Fyfe, 4th February 1813.

been engaged to carry on the operations of a pottery, for example, in this country, could not, it is presumed, be taken to England to carry on the same work there; unless it should appear, from the circumstances of the case, that the possibility of such a change of place was in contemplation. With regard to a domestic servant, on the other hand, he is not at liberty to leave his master, though he should make a very considerable change in his residence; as, by removing from the town to the country, or from one part of the country to another, because he is held to have engaged in contemplation, not of the place, but of the person. He will not, however, be compelled to attend his master where the change of residence is of an extraordinary nature, such as the parties cannot be supposed to have had at all in view at the time of forming their agreement. He is not bound to attend him to a foreign country, whatever additional allowance he may offer. Perhaps he is not bound to attend him even to distant parts of the same country or kingdom, permanently at least, because the rate of wages and the expence of living may probably be much greater there than in the places which the parties must be believed to have had in view at contracting; unless the master engage to make a suitable addition to his allowance, and to defray his charges in going and returning, and also to discharge him in such time as to enable him to find another situation in the quarter which he left; upon which conditions perhaps he is bound to attend him. Where the master will not allow the servant to remain where he is, but insists upon his going to a place to which he is not bound to go, he may leave the service, and will be allowed wages and board.

(3.) *To do work required.*—The servant must do the work required of him, if not essentially different from that which he undertook. Unless there be an express limitation in the agreement, or unless the servant have been hired in a particular capacity, it does not become him to make nice distinctions as to the work exigible from him. But this must be understood under reasonable limitations. Thus, a person hired as overseer to a colliery, is not bound to assist at the windlass wheel, or to click the coals at a pit (*a*). Domestic servants are much less entitled than others to make distinctions as to the kinds of work which may be required of them. They are not hired to do a particular piece of work. They enter into a state of service; a *general* engagement of obedience and subordination.

(*a*) Fairlie against M'Vicar, July 1775, in Hutcheson's J. P. 3d edit. ii. 168-9.

On any other footing, there would be nothing but continual broils and disputes in families. But, even in their case, there are limits to this doctrine. It would seem, for instance, that a housekeeper, in a large establishment, cannot be obliged to milk the cows, or a butler to attend the horses.

(4.) *To behave respectfully.*—The servant, especially if a domestic servant, must behave with due respect and deference to his master.

(5.) *To behave honestly and soberly, and to avoid turpitude.*—The servant must behave with honesty and sobriety; and, especially if a domestic servant, must even avoid every act of turpitude, which, though not striking directly against the interest of the master, makes his presence in the family a cause of scandal, and a source of bad example. Thus, in England, a woman servant falling with child may be dismissed; and the same has been held of a man servant debauching any of the female servants in the family (a). There seems no reason to suppose the law to be different in this country. It has virtually been found, or rather conceded, that a young woman engaged as a teacher in a family might be dismissed for loose character, and for having formerly borne a natural child, without subjecting the family in damages (b).

(6.) *Consequences of failure.*—For considerable failure in the performance of any of the points of the servant's duty which have now been mentioned, he may be immediately dismissed, without subjecting the master to wages for any part of the current term (except, perhaps, in very peculiar circumstances), or to board for the remainder of that term. Where any positive damage arises from the servant's failure to perform, the master is of course entitled to have that compensated by him.

## 2. *Obligations of Master.*

(1.) *To receive servant.*—The master must receive the servant into his situation at the stipulated term of entry (for which see the servant's obligation to enter), otherwise he will be liable in wages and board for the term of their engagement.

(2.) *To allow servant to continue.*—The master must allow the servant to continue with him during the full period agreed on (for which, see the servant's obligation to continue), unless

(a) Burn's J. P. tit. Servant, sect. 22.—William's J. P. tit. Servant, sect. 5; and authorities there cited.

(b) De Grosberg against ———, 10th August 1765: M'Laurin, p. 76; Morrison, p. 16,466.

there be good cause for dismissing him ; otherwise he will be liable in full wages, and, if the servant lived in the family, will also be liable in board. If there be blame on both sides, this will be a ground for restricting the sum. If the servant thus turned off get into another service before he brings the matter into a court of law, the sum awarded will be restricted to the wages which he has lost, and the expence to which he has been put, while out of service. If the action be brought recently after the servant is dismissed, so that it cannot be determined whether he has any reasonable expectation of getting into another service, perhaps the proper course is to decern, not for a gross sum, but for a certain sum weekly or monthly, *alternatively* till the next term, or till the servant find a service. If the engagement be for a number of years, as frequently happens in the case of the servants of manufacturers, the claim for damages is very much a question of circumstances. If the servant be turned off on account of the bankruptcy of his master, he is no doubt entitled to damages, but he cannot expect to be allowed to remain idle during the whole term, and thus be a burden upon the creditors. The judge will inquire into his probable gains, and his reasonable expectations of finding a new employment. Thus, a person who had been engaged for seven years as engineer of a distillery, having been discharged at the end of the fourth year on account of the bankruptcy of his master, and having claimed the full salary for the remaining period, was found entitled only to a proportion of it, *viz.* for such time as he remained unemployed (*a*). In one case, a person who had been hired for a year as teaser or fire stirrer of a glass-house, having been abruptly turned off at the end of the second week, the justices of the peace “found it presumed that “the pursuer either was or might have been some way usefully “employed for the 50 weeks he was out of service during the “time libelled ; and found that he could not be entitled to “the same wages during that time, that he might have been “entitled to, had he been at work ; and therefore modified the “wages to the half, and decerned for L.17. 10s. sterling ;” which was adhered to by the Court of Session (*b*). Upon the whole, it appears that if the master, without due cause, refuse to allow his servant to remain during the covenanted time, he will be subjected in such damages as, in the whole circumstances of the case, appear reasonable (*c*).

(*a*) *Puncheon against Trustees of Haig*, 17th November 1790.

(*b*) *Rae against Leith Glass-house*, 20th June 1750 ; *Kilk. Reparation*, 8.

(*c*) *Rae against Leith Glass-house*, *supra*.

(3.) *To treat Servant well.*—The master must treat his servant well; and give him due sustenance, if he have become bound to feed him (*a*). He must behave with gentleness and moderation towards his servant (*b*). He is no doubt entitled and bound to maintain his authority in his family: but (though an opinion of rather an harsher nature seems to have been current at the time when Mr Erskine wrote) he does not seem entitled, even where the servant is very young, to use personal violence. He ought rather, if the case require strong measures, to dismiss the servant; trusting for his defence, in any action which may be brought against him, to the propriety and necessity of the measure. Where a servant is really driven from a house by violence, he will be entitled, unless he gave great provocation, to full wages and board.

(4.) *To pay wages, &c.*—The master must make punctual payment of the stipulated wages or allowances at the stipulated time; otherwise the servant may raise action for payment, and may leave the service, though he have been hired for a longer period.

Though the engagement be for a year, the wages are payable half yearly; as the servant is not supposed to have funds sufficient to last longer. If the servant have died before the term, wages are due to his executors for the period which he has served. If the master have died before the term, and not the servant, full wages are due: and if the time for giving warning have expired (of which immediately) wages, and, in some circumstances, board, are due from the master's funds for an additional period. The heir or executor charged with this expence is entitled to have the service if he choose. Those wages are due only if the servant do not get into another service; for, if he do, he sustains no loss. It has already been considered (sect. Servant's Obligation to continue) how far full wages are due if the servant be sick during a portion of the time.

The wages of domestic servants for a whole or half year current, according to the period of the engagement (but not for arrears) are preferable debts (*c*). The executor of the deceased master may pay them instantly, as he may the death-bed fees of medical attendants and funeral charges, without waiting the steps necessary in the case of other claims against the deceased. They also appear preferable on the funds of a master who has become bankrupt (*d*). The wages of farm-servants are preferable upon the funds of a tenant, their master, who has become bankrupt, for the term current at his

(*a*) Bankton, l. 2. 55.

(*b*) Ibid.

(*c*) Erskine, iii. §. 43.

(*d*) Bell's Com. 4th edit. il. 164.

bankruptcy (*a*). And this preference extends not merely to servants engaged for a full term, but to all persons employed as farm servants, reapers for instance, however short the period of their service (*b*). Mechanical servants have no such preference (*c*); nor an overseer of a distillery (*d*); nor any other than domestic and farm servants. For the preference of the wages of farm servants in competition with the landlord's hypothec; see *Hypothec*.

How far the wages of servants are arrestable, see *Arrestment*.

Wages prescribe in three years. (See *Prescription*, sect. Three Years.)

### III. TERMINATION OF CONTRACT.

#### 1. *Modes of Termination.*

In touching upon the obligations of the parties, various ways have been noticed, arising from non-implement of those obligations, in which this contract may come to a *premature* termination. The *natural* termination of it is the expiry of the period (which is usually Whitsunday or Martinmas) or performance of the work for which it was entered into.

The mere expiry of the period, however, is not, in the ordinary case, held of itself to put an end to the contract. If the master or servant do not, one of them, intimate to the other, or *give warning*, a certain time before the expiry of that period, that he means to take advantage of that expiry, they are held to have consented that the connexion shall subsist for another period, upon the same terms, in every respect, as for the last period. This is called *tacit relocation*; and binds the parties as strongly as if they had entered into a formal contract. If the servant fail to give the necessary warning, he will be subjected in damages on refusal to serve. If the master fail to give it, he will be subjected in wages and board till the next term, if he refuses to receive the servant (*e*). The warning is usually direct. It is sufficient, however, that it be implied from the circumstances of the case, if those circumstances necessarily lead both parties to that understanding. But it is not sufficient that circumstances have occurred which make it doubtful merely whether the engagement be to con-

(*a*) Melville against Barclay, 23d January 1779.

(*b*) Lockhart against Paterson, 14th November 1804.

(*c*) White against Christie, 31st January 1781.

(*d*) Riddley against Creditors of Haig, 3d February 1789.

(*e*) Baird against Lady Don, 14th July 1779.



time, so as, for instance, to induce the servant to make inquiries about other places. Thus, in a case where a person had been hired as a gardener for a year, and where, near the expiry of the year, the garden had been advertised to be let, and where the master had made inquiries for other service, which circumstances were known to the servant, but where no other warning had been given, and the garden had in fact not been let, and the servant had been allowed to remain nine days after the term (in order, as was alleged to have been agreed, but was not proved, to compensate for absence by sickness) it was found that the servant had not been sufficiently warned (a). The time which the warning must precede the expiry is said not to be quite the same in all different kinds of service; and is sometimes regulated by express agreement. But the time which is most common, and is understood to be universal in the case of domestic servants, is forty days. Where a different custom is established in any kind of service, or in any place, that, of course, must regulate the parties, if there have been no express agreement. With regard to the evidence of warning having been given, it is not necessary that there should be witnesses to it; for a man does not usually call witnesses when he parts with a servant; nor may it always be advisable to refer the fact to the other party's oath. It will be sufficient, if it can be reasonably proved from circumstances, that they did part; as, if it can be proved, in the case of the servant insisting on staying after due warning, that he has been offering himself for other places at the proper time, as disengaged, or that he was aware at that time of others offering themselves for his place as vacant; or, if it can be proved, in the case of a master insisting on retaining the servant after due warning (which can hardly happen) that he was in the knowledge, at the proper time, of the servant offering himself, as disengaged, for other situations, or that he endeavoured at the proper time to find others to fill his place as vacant. The whole circumstances, however, must be such as necessarily infer that the parties understood their agreement to be at an end; for the servant's mere inquiry after other situations, for example, may have occurred from an uncertainty only whether the master would retain him, or from his not having made up his own mind whether he would remain (b). It is said that, in some parts of the country, the doctrine of *tacit relocation* is not in use; and that the presumption is, that the parties mean to separate at the agreed term, unless a new agreement be made to the contrary. In such places, it would ap-

(a) M'Lean against Fife, 4th February 1813.

(b) M'Lean, *supra*

pear, the local presumption must regulate the case, provided the custom be uniform and clearly proved, so as to establish to be a condition of the contract, and fully understood as such by both parties.

### 2. *Character.*

After the master and servant have agreed to separate, the latter usually asks a written *character* from the former. But the master is not bound to give a character, or to assign a reason for refusing to give it (*a*).

It has been found necessary in England to pass an act of Parliament (*b*) to punish the giving or using false characters or statements of service. But this act appears, and is understood, not to extend to this country; and all such offences reached here, by the vigour of the common law, as the Lower instances of such offences seem proper for the maintenance of the sessions of the peace, as breaches of the order of society, particularly from their connexion with the important subject of their jurisdiction now under consideration; but more aggravated instances of such offences, such as *viatic* or forging characters, seem more proper to be tried by a court of more extensive powers. (See *Arrest*, &c.)

For the law with regard to hiring in general, see *Location*.

For some regulations with regard to servants in certain manufactures, see *Manufactures*.

For the power of the servant to bind the master by ordering goods in his name, see *Mandate*, sect. Implied.

For the master's liability for the servant's wrong, see *Damages*, sect. Servant.

For compelling workmen, &c. by imprisonment to return to their service, see *Imprisonment*.

## SESSIONS OF THE PEACE.

THE sessions of the peace are a court held by two (*c*) or more justices of the peace of a county, for the execution of

(*a*) Fell against Lord Ashburton, 12th December 1800.

(*b*) 32 Geo. III. c. 56.

(*c*) Reid, December 1730; Dict. i. 508.—Mackay against Heriot, 10th July 1760.

their general duty. They are of two kinds, *General Quarter Sessions*, and *Petty or Ordinary Sessions*.

1. *General Quarter Sessions* are the quarterly meetings of the justices of the peace of a whole county. They are appointed to be held on the first Tuesdays of March, May, and August, and the last Tuesday of October (*a*). They may continue themselves, and may adjourn themselves, to such days and places as may be most convenient (*b*). But it is not competent to make an act that all quarter-sessions for the county should in future meet for form only on the days appointed by law, and should immediately adjourn to certain other days without doing business (*c*). They are held at the head borough of the county; and though they may on proper cause adjourn to another place, each quarter-sessions can meet in the first instance, as such, only at the head borough (*d*). The adjourned meetings are commonly called general sessions. Sometimes they are for a special piece of business; in which case they are commonly called special sessions. If there be not two justices present, the meeting of the quarter-sessions takes place on any other day in that quarter of the year.

The quarter-sessions have, in most cases, a power of reviewing by appeal the decisions of the petty sessions (*e*). They have also some business of a public nature (noticed under its proper heads) peculiar to themselves.

2. *Petty*, or ordinary, or intermediate *Sessions*, are the subordinate meetings of the justices of a county. These do the greater part of the judicial duty incumbent on the justices, and part also of the ministerial duty. The decisions of these sessions may be reviewed by the quarter-sessions of the county, except when otherwise specially enacted; of which under the proper heads. Counties of considerable extent are commonly divided into districts, in each of which petty sessions are held.

See *Justices of the Peace.—Process.—Districts.—Review.—Courts.*

(*a*) 1061, c. 38.

(*b*) Ibid.

(*c*) Hall against Robertson, 11th March 1777; Dict. iii. 356.

(*d*) Earl of Home and others against Sir Robert Pringle and others, 30th June 1741; Kilk. Jurisdiction of Justices, No. 2; Kames' Rem. Dec. p. 36; Elchies, Jurisdiction.

(*e*) Erskine, i. 2. 6.

## SHIPS, DESTROYING.

THE wilfully casting away, burning, or otherwise destroying of ships by the owners, officers, or mariners, with intent to injure the underwriters, or merchants having goods on board, or the owners, is punishable arbitrarily at common law (*a*); and capitally by statute (*b*). Justices of the peace, of course, cannot try for it, but may take the preparatory steps. (See *Arrest, &c.*)

See *Wrecks*.—*Seamen*.

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 SMALL DEBT ACT.

IT was found expedient to vest in justices of the peace in Scotland, a civil jurisdiction in small causes, to be exercised in a summary form. This was first done by the act 35 Geo. III. c. 123, which only conferred jurisdiction in causes not exceeding L.40 Scots (L.3. 6s. 8d. sterling) "arising out of personal contract or obligation," and which was only enacted for 5 years. The act 39 and 40 Geo. III. c. 46, entitled an act "for the more easy and expeditious recovery of small debts, and determining small causes" in Scotland, renewed the regulations of that act with improvements, extending the jurisdiction to L.5 sterling, without the limitation of the causes "arising out of personal contract or obligation," and made them perpetual. The act 6 Geo. IV. c. 48, entitled an act to "alter and amend" that act, repealed that act, and re-enacted the regulations, with farther improvements; and this act now regulates the matter (*c*).

Those things are stated here with regard to actions under this act, which have been specially enacted or decided with regard to them. The circumstances common to them, with other actions, are stated under their proper heads.

(*a*) Hume, l. 179, 482.

(*b*) 29 Geo. III. c. 46. The act 43 Geo. III. c. 113, does not extend to Scotland.

(*c*) It may be mentioned that, by act 6 Geo. IV. c. 24, sheriffs are enabled to exercise their civil jurisdiction to the amount of L.8 sterling in a summary way.

## I. CONSTITUTION OF THE SMALL DEBT COURT.

The small debt court may be held by any two or more justices of the peace within their respective counties or stewardries (*a*). But if no more than one justice be present at the time and place appointed for a district meeting, he may, then and there, hold a court for the purpose of calling the roll of causes, of pronouncing decrees in absence, receiving returns of the executions of citations, and granting warrants for citation *de novo*, but for no other purposes (*b*).

The justices of the peace for each county may, at any meeting of the quarter sessions, make suitable divisions of the county or stewardry into districts where not already done, or alter the divisions already made, within which the justices of the peace shall meet at such stated times and places as the quarter sessions fix as most convenient, in order to carry the purposes of this act into execution, and which meetings may be adjourned, if necessary, to any other lawful day or days, to be held at the same place; and of such divisions into districts, and of the stated times and places of meetings so to be appointed, or of the alterations of such divisions or stated meetings, where alterations are necessary, the quarter sessions are to order due notice to be given by advertisement at the church doors of every parish in the county or stewardry, at least two Sundays previous to the first stated meetings so appointed or altered (*c*).

By an enactment of a general nature (see *Justices of the Peace*) no solicitor or procurator in any inferior court in Scotland, or the partner of any such person, is capable to be a justice of the peace, or to act as such, in any county in Scotland, during such time as such solicitor, procurator, or partner of any such person, continues in the business or practice of solicitor or procurator in any inferior court (*d*).

If the clerk of the peace fail to attend, either personally, or by a sufficient deputy, in any of the districts at the meetings appointed by the justices, of which the clerk has had due notice, the justices who attend at such meeting are empowered to name an interim clerk for that district, who is removable by any subsequent quarter sessions, and another clerk may then be appointed by the quarter sessions from time to time, as they may see cause (*e*).

## II. CAUSES COMPETENT.

The justices of the peace in the small debt court have jurisdiction in "all causes and complaints brought before them

(*a*) 6 Geo. IV. c. 48, sect. 2.

(*c*) Sect. 21.

(*d*) Sect. 27.

(*b*) Sect. 16.

(*e*) Sect. 22.

“concerning the recovery of debts, or the making effectual any demand, provided always that the debt or demand shall not exceed the value of five pounds sterling, exclusive of expences” (*a*). But they are declared not to be competent to any debt or demand where the title of any lands, tenements, or hereditaments, or where any heritable right whatsoever, is brought in question, nor to any other debt, matter, or thing that shall or may arise upon or concerning the validity of any will, testament, or contract of marriage, although the same shall not amount to the sum of five pounds sterling; nor to any debt for any money or thing won at or by means of any horse-race, cock-match, or any kind of gaming or play, or any debt or demand for or on account of any spirituous liquors” (*b*).

Under these expressions (for the expressions conferring jurisdiction under the former small debt act, 39 and 40 Geo. III. c. 46, were the same) it has been decided that they are competent to actions against a party who is alleged to have subjected himself to the debts of a deceased debtor, by incurring representation of that person, in consequence of intromission with his effects, although the rules of passive representation are in some measure of a positive and peculiar nature (*c*): that they can award damages, not exceeding L.5, against a man in a profession, *e. g.* a messenger, for professional misconduct, although involving a charge of fraud (*d*): that they are competent to a claim of damages for wrongous imprisonment and expences occasioned by it, although founded on an alleged delict of the defender, upon an averment of injustice, oppression, and wrongous imprisonment; and although the amount was originally greater, the sum claimed not exceeding L.5, in consequence of deductions (*e*): and that they are competent to a claim for the rent of a stall in a public market, there being no question of title involved (*f*). They seem also to be competent, although it is believed that doubts are entertained upon the subject in some parts of the country, to award damages not exceeding L.5 for an assault or other criminal act.

It is not competent to divide a sum exceeding L.5 into parts, in order to admit the case into court (*g*). But a claim

(*a*) 6 Geo. IV. c. 48, sect. 2.

(*b*) Sect. 25.

(*c*) Johnston against Kelloe, 19th January 1803.

(*d*) Turnbull against Brown, 14th February 1801.

(*e*) Laing against Fyfe, 8th February 1823.

(*f*) Thomson against Boyd, 25th Feb. 1824.

(*g*) Anderson, 20th December 1793, in Hutcheson, i. p. 141.

for a balance not exceeding L.5, to which a larger demand has been reduced by deductions, is competent, as has just been noticed; or it is competent for a party having a larger claim to restrict it to L.5.

The act provides, "that no person liable to be summoned by virtue of this act shall be exempt from the jurisdiction of the said justices on account of privilege, as being a member of any other court of justice" (a). This has reference to the general right which members of the College of Justice have to decline inferior courts. (See *Declinature*.)

### III. PROCEDURE.

The causes brought before the justices under this act are to proceed upon complaint agreeable to the form subjoined to the act, and to this article, stating shortly the origin of debt or ground of action, and concluding against the defender; and the clerk of the peace, or any deputy appointed by him, or, if he fail to appoint one, the clerk to be appointed within the district, as before mentioned, is to adject to the complaint, and on the same paper, a warrant signed by him, agreeable to the form subjoined to the act, and to this article; which warrant is to contain an authority to any constable or peace officer for summoning the defender to appear and answer at the next meeting of the justices in the district where the defender resides, or, where the meetings of the courts are held weekly, then in the option of the pursuer, at the second or third diet of court from the date of the warrant, such diet not being sooner, in either case, than upon the sixth day after the date of the citation, and also for summoning witnesses, at the instance of either party, to the same day and place: and a copy of the complaint and warrant, with the citation annexed, agreeable to the form annexed to the act and to this article, and also a copy of the account, document of debt, or state of the demand, is to be delivered by a constable or peace officer to the defender personally, or left at his dwelling place; in which latter case, if the defender do not appear at the diet of court to which he has been cited, he is to be cited a second time personally, or at his dwelling house or place of abode, upon the words *de novo* being either subjoined to the original complaint, and signed by any one justice of the peace, or written in the procedure book kept by the clerk, and signed by the justices or the preses, to appear either at the next stated meeting, or at a meeting to be held by adjournment for that purpose, and fixed by the justices

(a) 6 Geo. IV. c. 48, sect. 24.

clerk is to certify to the justices at their said next meeting application for rehearing and the sist granted, which was being served by a constable or other peace officer upon pursuer, either personally or by two citations left at his dwelling house or place of abode, in the manner provided in cases by this act, is to be an authority for having the matter reheard at the next court day (provided it be not sooner than the sixth day from the date of the personal citation given to the pursuer, or of the second citation left at his dwelling house or place of abode; or if the meeting of the court be sooner than the sixth day from the date of such citation, then at the court day next following): And the justices may continue the sist granted in such cases from the first meeting of the court after the application for a rehearing has been made, as long a time as may be necessary for the appearance of the parties in order to be reheard; and in like manner, where absolution has been passed in absence of the pursuer, he may, at any time within one calendar month thereafter, upon consigning two shillings and sixpence in the hands of the clerk, obtain a warrant, signed by the clerk, for citing the defender and witnesses for both parties, which warrant, being served by a constable or other peace officer upon the defender, either personally or by two citations left at his dwelling place, in the manner provided in other cases by this act, is to be an authority for having the matter reheard at the next court day, or court day following as provided in the case of a rehearing at the instance of the defender; the two shillings and sixpence so deposited by the pursuer being in every case previously paid over to the clerk (a).

In case it be proved to the satisfaction of the justices that the non-attendance of parties or witnesses has been occasioned by any failure of duty on the part of the constable or other peace officer, the justices may punish him by a fine to the poor, or by imprisonment, the fine not exceeding twenty shillings sterling, or the imprisonment not exceeding ten days, reserving to the party injured any claim and recourse competent to him by law against the constable or other officer for damage which he may have sustained by such failure of duty (b).

The clerk or depute clerk is to keep a book, in which is to be entered the names and designations of the parties, and whether present in court or absent at the calling of the cause, the nature and amount of the claim, and date of giving it in, the mode of citation, the several deliverances or interlocutions

(a) 6 Geo. IV. c. 48, sect. 8.

(b) Sect. 8.



orders of the justices, and the final judgment or decree, with its date, which last is to be signed by the justices present, or by their preses if more than two be present, the entries by the clerk being agreeable to a schedule or form annexed to the act, or with such addition to those entries as the justices of the peace in the several counties authorize and appoint, for the better and more regular dispatch of the proceedings before them; and a copy of the decree, containing warrant for arresting or pouding the effects of the defender, or for committing his person to prison, together with a particular note or statement of the expences, in those cases where expences have been awarded, as they have been incurred and are authorized by this act, is to be annexed by the clerk to the complaint, and on the same paper with it the said copy of decree and warrant, being conformable to the schedule annexed to the act and to this article; which copy of decree and warrant, being signed by the clerk or his deputy, and delivered to the party in whose favour it is granted, is a warrant for execution, after the expiration of ten free days from the date of pronouncing the decree, if the party against whom it was given was personally present in court when it was pronounced, or had appeared by one of his family admitted to attend for him, or if he was not so present, execution is only to proceed after a charge of ten free days, to be given by the constable or peace officer, either by delivering a copy of the decree or judgment to the party personally, or leaving it at his dwelling house or place of abode, to which charge the constable or officer is to make oath, if required (a).

Warrants for execution, granted by justices of the peace on their decrees for civil debts, cannot be summarily enforced by the justices of a different county, as was clearly and unanimously found by the court in a case where a defender had removed from the jurisdiction of the justices who had granted warrant of imprisonment, and was apprehended in the county to which he had removed, upon a concurrence summarily granted by the justices of that county, and was conveyed to prison within the jurisdiction of the justices who had granted the original warrant. And the opinion of the court is understood to have been, that the only proper course was an action before the justices of the county into which the defender had removed, under the small debt act, or an action before any other competent court in that jurisdiction, in which probably the pursuer might produce the original decree, and warrant obtained by him as evidence of the debt, but in which

(a) 6 Geo. IV. c. 48, sect. 10.

the defender would be heard in defence; and if decree was pronounced against him, he would receive a charge in the ordinary course of proceeding (a).

The justices may, if they think proper, direct the sum or sums found due to be paid by instalments, weekly or monthly, according to the circumstances of the parties found liable, and under such conditions or qualifications as they think fit to annex (b).

The justices are directed to "hear, try, and determine, as shall appear to them agreeable to equity and a good conscience" (c). These terms have relation chiefly to certain equitable and extraordinary powers conferred by the act, for instance, the power to make the sum awarded payable by instalments. They were not intended to give an arbitrary power. The justices (as all other judges) must still decide questions of law according to law, and questions of fact according to the proof of the fact; and they must decide in favour of the party who has *right* to prevail, whatever ideas they may have that his plea is ungracious, or contrary to their notions of the equity of the case (d). And this obligation to decide questions of law according to law has made it unavoidably necessary to admit into this summary several articles upon the civil part of the law, which might otherwise have been dispensed with.

The execution of the poinding by the constable is to be summary, by carrying the effects poinded to the nearest market town, or kirk town, or village within the parish, and after getting them duly appraised, in the manner to be regulated by an order of the justices for each county, at their quarter-sessions, selling them between the hours of eleven and one o'clock at the cross or most public place, after one hour's notice given by a crier, by public roup, to the highest bidder, but reserving to the justices, at their quarter-sessions, if they shall see fit, to appoint a different hour for the sale, not being earlier than that above mentioned, or a longer notice to be given of the time of selling; and the overplus of the price, if there shall be any after payment of the sums decreed for, and the expences, if expences are awarded, including what is allowed by this act for the poinding and sale, is to be returned to the owner; or if the effects be not sold, they are to be delivered over at the appraised value to the creditor, to the amount of the debt and expences, if expences be awarded, in-

(a) M'Allister against Scott, 11th February 1826; Fac. Coll.

(b) 6 Geo. IV. c. 48. sect. 11.

(c) Sect. 2.

(d) Hutcheson, 3d edit. l. 134-9, and authorities there cited.

cluding the allowance for poinding: But in case the place of sale is not a market town, but only a kirk town or village, the place and time of sale are to be advertised two days at least before the day of sale, at the door of the parish church, on Sunday after the forenoon service (*a*).

No constable, or other officer of the peace, to whom execution of the decrees and warrants of the Justices in cases falling under this act, may be committed, is to be liable to any penalty, fine, or punishment for selling goods or effects under authority of such decrees and warrants, by public sale or auction, although such constable or peace officer may not be licensed as an auctioneer, notwithstanding the act 19 Geo. III. c. 56, or any other act for regulating sales by public auction, or imposing duties thereon (*b*).

In all cases of execution, by poinding or imprisonment, the constable or other officer to whom the execution is committed must, on or before the next court day thereafter, make a return or report to the clerk of court, either in writing or verbally, as may be required by the justices, of the date and manner of the execution, the number of assistants employed, and the sum or amount, if any, recovered since the date of the decree; and, in case of a poinding, must farther state the value at which the goods were appraised, the place and times of sale, the charges paid for conveyance of goods and for warehouse room where these charges were incurred, and the price for which the goods were sold in cases where a sale was made; or if the execution was by imprisonment, he must, in his report, state the gaol in which the debtor was incarcerated, which particulars, so reported by the constable or officer, are to be entered by the clerk either in the procedure book, or in other books to be kept for that purpose, and are to be laid before the justices at their meeting next after the report has been made, and is also to be exhibited by him to any person desiring inspection for such fee as may be allowed by order of the justices, not exceeding sixpence for each time of inspection (*c*).

Certain limited fees are prescribed in detail in the act (*d*). An abstract of the table of fees is to be printed on each complaint, and on each copy of complaint for service, agreeably to a form annexed to the act (of which a copy is inserted be-

(*a*) 8 Geo. IV. c. 48, sect. 12.

(*c*) Sect. 13.

(*b*) Sect. 26,

(*d*) Sect. 17.

low (a) ) or other form to be settled by the justices of the peace, and a copy of the table, signed by two of the justices, and by the clerk, is to be suspended, and continued at all times in a patent situation in the clerk's office, and in every court room or place for holding of courts under the authority of this act; and the fees are to be subject to modification by the justices in very small cases, or where one complaint is directed against two or more defenders (b).

If any clerk or depute clerk of the peace, or any constable or other officer, exact or take from any party, in a case of small debt, any fee not expressly authorized by this act, or any higher rate of fee than is authorized by it, the person so offending is to be liable to a penalty not exceeding, if he be a clerk or depute clerk, the sum of five pounds for each offence, or if he be a constable or other officer, not exceeding the sum of twenty shillings for each offence; which penalties respectively are to be awarded by the justices of the peace, either at

(a) Copy of the abstract as prescribed by the act.

" Fees allowed by the Act :—

" CLERK'S FEES.

	s.	d.
" Complaint, warrant to cite, . . . . .	0	6
" Copy for service, . . . . .	0	6
" Entering into procedure book, . . . . .	0	6
" For defender's appearance, . . . . .	0	6
" For every oath of party, . . . . .	1	0
" For every oath of witness, . . . . .	0	4
" Decree and warrant of execution, . . . . .	0	6
" Warrant de novo, . . . . .	0	4
" Rehearing, . . . . .	1	6
" For inspection of book, . . . . .	0	6

" CONSTABLE'S FEES, including Assistants.

" Citation and execution, . . . . .	0	4
" Execution of Arrestment, . . . . .	6	6
" Ditto of poinding, . . . . .	3	0
" Sale, . . . . .	2	0
" Imprisonment, . . . . .	3	0
" Travelling expences per mile, constable, . . . . .	0	4
" Assistants, each . . . . .	0	3

" CRYER'S FEES.

" For calling . . . . .	0	1
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" N. B.—The justices strictly enforce the provision of the act which requires a copy of the account, document of debt, or state of the demand, to be delivered to the defender at the time he is summoned."

(b) 4 Geo. IV. c. 48, sect. 18.

a quarter-sessions or at a district meeting, on complaint, either written or verbal, from the party who has been aggrieved by such illegal exaction, and satisfactory proof thereof, and which penalties the justices are to direct to be paid either to the party complaining or to the poor, or partly to both, as they may see fit, reserving always to the justices the power competent to them of farther punishing their officers by suspension or dismissal, for this as well as other acts of malversation in office (*a*).

An account is to be kept by the clerk of court of all fines awarded by the justices by virtue of this act; and all such fines, where the application of them is not otherwise provided for and directed by this act, are to be paid to the poor in such manner as the justices shall direct (*b*).

For the better regulating the proceedings of the justices empowered to hear and determine causes under this act, the justices, at their quarter-sessions, may, from time to time, make such rules and orders as they shall find to be necessary and most conducive for carrying into effect the provisions and purposes of this act, such rules and orders not being inconsistent with any of the express enactments or conditions contained in the act, or otherwise contrary to law; and those rules and orders are to be in force and observed by the justices empowered to hear and determine such causes, and their clerks and officers, and the suitors before them, until they be repealed or varied by the justices at their quarter-sessions, or by the Lords of Session or Justiciary at Edinburgh, or by the Circuit Courts of Justiciary, on the application of any two or more justices of the peace (*c*).

#### IV. REVIEW.

Decree given by the justices, in any case competent to them by this act, is not subject to advocacy, nor to any suspension, appeal, or other stay of execution, except in the case of consignation, as before noticed, for the purpose of a re-hearing before the justices; and is not liable to be set aside or altered in an action of reduction before the Court of Session, on any other ground than that of "malice and oppression" on the part of the justices; and such action of reduction is not at all competent after the expiration of one year from the date of the decree of the justices (*d*). And in case of a reduction being

(*a*) § Geo. IV. c. 48, sect. 19.

(*b*) Sect. 20.

(*c*) Sect. 23.

(*d*) Sect. 14.—The competency of reduction was not so much limited in the act 35 Geo. III. c. 123, as to the construction of which see Johnstone against Kelloe, 19th January 1803; nor in the act 39 and 40 Geo. III. c.

brought within that time on the alleged ground of malice and oppression, the pursuer must, before the summons of reduction is called, find sufficient caution in the hands of the clerk of court, for payment of such expences as may be awarded against him (*a*). Suspension, advocacy, and reduction, generally, seem to be competent if the justices exceed the powers given by the act (*b*).

### V. FORMS OF PROCEEDINGS, &c.

[In almost all counties, forms of proceedings are printed, with the necessary blanks for filling in names and designations, dates, &c. and in the proper combinations for the different purposes for which they are required; which in all cases is very expedient, and in most places is indispensable in practice.]

#### 1. *Complaint (as prescribed by the act.)*

“Unto the honourable his Majesty’s justices of the peace  
“for the shire of

“A B,” [design him] “complains that C D” [design him]  
“is owing to the complainer, the sum of \_\_\_\_\_ which he  
“refuses to pay unless compelled; therefore the said C D, de-  
“fender, ought and should be decerned and ordained to make  
“payment to the complainer of the aforesaid sum of  
“with expences.”

“A B.”

[The names and designations of the parties are inserted in the complaint. It ought merely to state shortly the origin of the debt or ground of action, and conclude against the defender, so that it may be the foundation for the decree; and ought not to set forth circumstances or arguments. The defence and all circumstances and arguments are stated verbally in presence of the court.]

#### 2. *Warrant for citation of the defender (as prescribed by the act.)*

“At \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_, the  
“clerk of peace for the shire of \_\_\_\_\_ grants warrant for

46, as to the construction of which see Sempill against Alexander, 19th January 1810, and Bishop against Chisholm, 16th June 1820.

(*a*) 6 Geo. IV. c. 48, sect. 15. (*b*) See Turnbull against Brown, 14th February 1801.—Laing against Fyffe, 8th Feb. 1823.—and Thomson against Boyd, 26th February 1824.

“ summoning the said defender to compear before the justices  
 “ of the peace for the said shire at \_\_\_\_\_, in the court-  
 “ house thereof, upon \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_  
 “ at \_\_\_\_\_ o’clock \_\_\_\_\_ noon, to answer at the instance of the  
 “ said complainer ; and appoints a copy of the account pursued  
 “ for, document of debt, or state of the demand, to be deliver-  
 “ ed to the defender along with the citation ; also grants war-  
 “ rant for citing witnesses for both parties to compear at same  
 “ place and date, to give evidence in the said matter.”  
 “ E F, Clerk.”

[This is adjected to the complaint, and on the same paper.]

### 3. Citation of the defender.

“ I, G H, constable, summon, warn, and charge you C D,  
 “ above designed, to compear before his Majesty’s justices of  
 “ the peace for the shire of \_\_\_\_\_ within \_\_\_\_\_  
 “ upon the \_\_\_\_\_ day of \_\_\_\_\_ one thousand eight  
 “ hundred and \_\_\_\_\_ years, at \_\_\_\_\_ o’clock \_\_\_\_\_ noon, to  
 “ answer at the instance of the above designed A B, complain-  
 “ er ; with certification that, if you fail to appear, you will be  
 “ held as confessing the debt, or the justice of the demand.  
 “ This I do upon the \_\_\_\_\_ day of \_\_\_\_\_, one  
 “ thousand eight hundred and \_\_\_\_\_ years.”  
 “ G H, Constable.”

[This is served upon the defender, annexed to a copy of the complaint and of the warrant, with a copy of the account, document of debt, or state of the demand. It is served by the constable delivering it to the defender personally, if he be found at his dwelling-house, or if he happen to be found elsewhere ; or, if not found personally, by leaving it for him at his dwelling-house with his wife, child, servant, or other inmate of his family, to be delivered to him, and, if they refuse to take the copy, by leaving it in the key-hole, or otherwise affixed upon the principal door of the house ; or, if he do not get admittance, by leaving the copy affixed to the door in the same manner, after giving six audible knocks at it, so that persons within might hear.]

### 4. Execution of citation of the defender (as prescribed by the act. The words printed in italics are not in the form prescribed by the act, but are proper and necessary.)

“ Upon the \_\_\_\_\_ day of \_\_\_\_\_ one thousand eight  
 H h 2

" hundred and I, G H, constable, summoned  
 " above designed C D, to compear before his Majesty's just  
 " of the peace, time and place above mentioned, to answer  
 " the instance of the complainer, with certification that  
 " will otherwise be held as confessing the debt. This I do  
 " delivering a full copy of the before complaint and ven  
 " with a short copy of citation thereto subjoined, signed by  
 " as also a copy of" [the account, document of debt, or of  
 " the demand] " to the defender personally apprehended  
 " by leaving a full copy, &c. with his wife," [or " son,  
 " daughter,"] [or " servant,"] [or as the case may be] " to  
 " in his dwelling-house at to be delivered  
 " him, because I could not find himself personally there  
 " by leaving a full copy, &c. in the lock-hole of" [or " door  
 " to"] " the principal door of his dwelling-house at  
 " after giving six audible knocks at it, because I could not  
 " him (if personally, and could not get admittance at  
 " dwelling-house," [or as the case may be.]  
 " G H, Constable

[This execution is annexed to the complaint and return]

[It is sufficient, by the small debt act, that the officer  
 appear and give evidence on oath of his having duly executed  
 defender in the manner prescribed. But it is the practice  
 to return a written execution.]

##### 5. Citation of witnesses.

" I, G H, constable, summon, warn, and charge you  
 " M," [design him] " to appear before his Majesty's justice  
 " of the peace for the shire of , at  
 " upon the day of , one thousand eight  
 " hundred and years, at o'clock  
 " to bear witness for A B," [design him] " in his complaint  
 " against C D," [design him] [or " to bear witness for C D  
 " [design him] " in the complaint against him at the instance  
 " of A B," [design him]. " This I do upon the  
 " , one thousand eight hundred and years  
 " G H, Constable

[A witness is summoned in the same manner as a defender  
 which has just been noticed.]

##### 6. Execution of citation of witnesses.

" Upon the day of one thousand eight hundred  
 " hundred and years, I, G H, constable, lawfully executed



“moned, warned, and charged L M,” &c. [Name and design the different witnesses summoned] “to appear before his Majesty’s justices of the peace for the shire of \_\_\_\_\_, at \_\_\_\_\_ upon the \_\_\_\_\_ day of \_\_\_\_\_, one thousand \_\_\_\_\_ and \_\_\_\_\_ years, at \_\_\_\_\_ o’clock noon, to bear witness,” [as above]. “This I did by delivering a just copy of citation, signed by me, to the said L M, personally apprehended,” [or as the case may be. See citation of defender.]

7. *Warrant for citation of the defender de novo.*

[The warrant is granted in the summary form mentioned in the text. The extract of it may be as follows.]

“At \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_, one thousand \_\_\_\_\_ eight hundred and \_\_\_\_\_ years, warrant is hereby granted to constables of court, for summoning C D,” [design him] “*de novo*, to compare before his Majesty’s justices of the peace for the shire of \_\_\_\_\_, at \_\_\_\_\_ upon the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_ years, at \_\_\_\_\_ o’clock noon, to answer at the instance of A B,” [design him] “complainer.”  
“E F, Clerk.”

8. *Citation of the defender de novo.*

“In virtue of the warrant, a copy of which is prefixed, I, G H, constable, a second time, summon, warn, and charge you, C D, above designed, to compare before his Majesty’s justices of the peace for the shire of \_\_\_\_\_, at \_\_\_\_\_ upon the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_ years, at \_\_\_\_\_ o’clock noon, to answer at the instance of the above designed A B, complainer, with certification that, if you fail to appear, you will be held as confessing the debt. This I do upon the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_ years.”  
“G H, Constable.”

[Or it may, in certain circumstances, in terms of the act, be done upon the original warrant, without a new warrant; thus:]

“I, G H, constable, in respect you were not personally found at the time of the first citation, do hereby a second time summon,” &c.

[The citation *de novo* is subjoined to a copy of the complaint and original warrant (and of the second warrant, where there was such) and a copy of the account, document of debt, or state of the demand, is again served upon the defender, in the same manner as is required for the first citation ; which has already been noticed.]

9. *Execution of citation of the defender de novo.*

“ Upon the                      day of                      one thousand  
 “ eight hundred and                      years, I, G H, constable,  
 “ a second time lawfully summoned, warned, and charged the  
 “ before named and designed C D, defender, to compare be-  
 “ fore his Majesty's justices of the peace for the shire of  
 “                      , within                      upon the                      day  
 “ of                      , one thousand eight hundred and  
 “ years, at                      o'clock                      noon, to answer at  
 “ the instance of the above designed A B, complainer ; with  
 “ certification, that if he failed to appear he would be held as  
 “ confessing the debt. This I did by delivering a full copy  
 “ of the foregoing complaint and warrant, with a short copy  
 “ of citation thereto subjoined, as also a copy of” [the account,  
 document of debt, or state of the demand] “ to the defender  
 “ personally apprehended,” [or otherwise according to circum-  
 stances ; see execution of first citation of defender.]

[This execution is annexed to the complaint, original warrant, and warrant *de novo*, where there was such.]

[By the act the constable may make oath to the execution as in the case of a first citation. But it is the practice to return a written execution.]

10. *Decree and warrant for execution (as prescribed by the act.)*

[The original decree pronounced by the justices is noted in a book kept for the purpose, as prescribed by the act. The extract of the decree upon which execution proceeds, is directed to be in such terms as the following.]

“ At                      the                      day of                      one thousand  
 “ eight hundred and                      years, the which day his Majes-  
 “ ty's justices of the peace for the county of                      found  
 “ and hereby find the within designed                      defender, liable

" to the also within designed                      pursuer, in the sum  
 " of                      with                      of expences, as herein below  
 " marked ; and decerned and ordained, and hereby decern and  
 " ordain instant execution by arrestment, and also execution  
 " to pass hereon by poinding and imprisonment after  
 " free days.

" E F, Clerk."

[Or the form may be modified according to circumstances.  
 For example, the following is the form commonly used in the  
 county of Edinburgh, both in the sheriff's small debt court and  
 in the justices' small debt court, where the decree is for pay-  
 ment by instalments.]

" At                      the                      day of                      one thousand  
 " eight hundred and                      years, the which day his Ma-  
 " jesty's justices of the peace for the shire of                      ,  
 " decerned and ordained, and hereby decern and ordain the  
 " within designed C D, defender, to make payment to the also  
 " within designed A B, pursuer, of the principal sum of  
 "                      sterling, with                      of expences, and that by  
 " instalments, at the rate of                      and decerned and  
 " ordained, and hereby decern and ordain, execution to pass  
 " hereon for the said instalments, by arresting, poinding, or im-  
 " prisonment, in terms of the act of Parliament ; but with  
 " certification, that if the defender allow two instalments to  
 " run into the third unpaid, then the indulgence of paying by  
 " instalments shall cease, and execution may immediately pass  
 " for the whole sums remaining unpaid. And ordain execu-  
 " tion to pass by the diligence aforesaid for the whole sums  
 " decerned for and unpaid, in terms of the said act of Parlia-  
 " ment.

" E F, Clerk."

11. *Certificate of consignation for rehearing of decrees in absence, and sist of execution.*

" At the office of the clerk of the peace in                      , the  
 "                      day of                      one thousand eight hundred  
 " and                      years, that C D" [design him] " has this day  
 " consigned                      of principal with                      of  
 " expences for a rehearing of the small debt court decret  
 " against                      at the instance of                      , is hereby  
 " certified, and sist of execution is granted till                      ,

THE COURT OF COMMONS

IN THE MATTER OF THE PETITION OF

THE PETITIONER PRAYING THAT HE MAY BE  
ADMITTED TO THE PRIVILEGE OF PARLIAMENT  
AND THAT HE MAY BE ALLOWED TO SIT  
IN THE HOUSE OF COMMONS  
AND THAT HE MAY BE ALLOWED TO SPEAK  
IN THE HOUSE OF COMMONS  
AND THAT HE MAY BE ALLOWED TO SIGN  
THE PETITION

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IN THE HOUSE OF COMMONS  
AND THAT HE MAY BE ALLOWED TO SIGN  
THE PETITION

"G. H. Constable"

14. Discretion of citation for rehearing.

"Upon the day of one thousand eight hundred  
year, 1, 11, constable, lawfully summoned,

“warned, and charged,” [the pursuer, or the defender. Name and design him] “to compare before his Majesty’s justices of the peace for the county of \_\_\_\_\_, within \_\_\_\_\_, upon the \_\_\_\_\_ day of \_\_\_\_\_ one thousand eight \_\_\_\_\_ hundred and \_\_\_\_\_ years, at \_\_\_\_\_ o’clock noon, to answer at the instance of” [the defender, or the pursuer. Name and design him] “the” [defender or pursuer] “having made consignment in terms of the act of Parliament, in order to have the cause reheard, with certification. This I did, by delivering a just copy of citation subscribed by me to” [the pursuer or the defender] “personally apprehended” [or as the case may be; as in the execution of the first citation of a defender.]

“G H, Constable.”

15. *Charge for payment.*

“I, G H, constable, by virtue of the decret, of which the above is a just copy, charge you the before designed C D, to make payment to the before designed A B, of the foregoing said sums, within ten free days from this date,” [or as the case may be, in the case of instalments or other indulgence] “under the pains of poinding and imprisonment. This I do upon the \_\_\_\_\_ day of \_\_\_\_\_ one thousand eight hundred \_\_\_\_\_ and \_\_\_\_\_ years.

“G H, Constable.”

[This is subjoined to a copy of the decree.]

[The charge is given by delivering it personally, or to an inmate of the family at the dwelling-house, or by leaving it affixed to the door of the dwelling-house, in the same manner as a citation of a defender, which has been already noticed.]

16. *Execution of charge for payment.*

“Upon the \_\_\_\_\_ day of \_\_\_\_\_ one thousand eight \_\_\_\_\_ hundred and \_\_\_\_\_ years, I, G H, constable, by virtue of the foregoing extracted decret, lawfully commanded and charged the within designed C D, defender, to make payment to the also within designed A B, pursuer, of the sums of money, principal and expences, as contained in the foregoing decret, and that within the time and under the pains therein expressed. This I did by delivering a just copy of the foregoing decree, and a charge the reonannexed, subscribed

“by me, to the said C D, defender, personally apprehended”  
[or otherwise according to circumstances, in the same manner  
as in the execution of a citation of a defender.]

“G H, Constable.”

[This execution is annexed to the original extract of the decret, which was the warrant upon which the charge proceeded.]

See *Arrestment*.—*Declinature*.—*Forum*.—*Imprisonment*.—*Parties*.—*Poiniding*.—*Proof*.—The different contracts, &c.

## SODOMY AND BESTIALITY.

THESE are capital crimes. The attempt to commit them is punishable arbitrarily (*a*). Justices may arrest, &c. See *Arrest*, &c.

## SOLDIERS.

THE principal provisions with regard to soldiers being contained in the annual mutiny acts, it is impossible to give the year of the king's reign, chapter, or section. An outline is here given of the provisions most usually made, as far as justices seem concerned; but as those provisions are sometimes altered, justices, in any step of consequence, ought to consult the mutiny act for the year.

According to the most common style of the mutiny act, of ficers and persons employed in the artillery, or engineers, or military surveyors and draftsmen, or military artificers or gunners of the ordnance, are comprehended under it; as are all persons employed on the recruiting service, and receiving regular pay. Militia, yeomanry, and volunteers, are not comprehended, unless in so far as specially provided in the acts regarding them (*b*).

(*a*) Hume, i. 466-7.

(*b*) *Note*.—The marine forces while on shore are regulated by an annual act, containing nearly the same provisions as the act with regard to soldiers. There are a few slight differences, occasioned by their being subject to the

## I. ENLISTING SOLDIERS.

Any person enlisted for the land service must go within four days, and not sooner than twenty-four hours, after enlistment, along with an officer or soldier of the recruiting party, before a justice of the peace or the chief magistrate of the place of enlistment, not being an officer of the army (*a*), and may declare his dissent from the enlistment; and, on such declaration, returning the enlisting money, and paying 20s. for the charges expended on him (in which the shilling of earnest is included (*b*)), and returning the full rate allowed by law for his subsistence or diet, and small beer, subsequent to enlisting, he must be forthwith discharged; but if he do not, within twenty-four hours after declaring his dissent, return and pay such money, he is to be held enlisted; in which case, or, if he declare that he voluntarily enlists, the magistrate is to read over to him, or to cause to be read over in his presence, the third and fourth articles of the second section, and the first article of the sixth section of the articles of war, and to administer the oath of fidelity (all to be immediately mentioned) and to administer certain other oaths (which are given in the mutiny act); and if the person take the oaths, the justice, &c. is to certify under his hand the enlisting, swearing, with the place of the birth, age, and calling, if known, in a form detailed in the annual acts. If the person refuse to take the oath of fidelity, the officer may detain him till he take it. The person may go by himself before the magistrate, within four days after enlistment, and declare his dissent, and return the money, if the recruiting party have left the place, or if, from any other cause, he cannot get one of them to go along with him. Where no officer of the recruiting party is present, the justice keeps the money lodged by the person dissenting, till properly applied for. Magistrates are to transmit to the secretary at war duplicates of certificates of the name and residence of persons receiving enlisting money, and absconding. Persons receiving enlisting money, and absconding, or refusing to go before the magistrate, are to be deemed duly enlisted. If apprentices enlist, and state to the magistrate that they are not such, they may be

jurisdiction of the Admiralty. By 39 Geo. III. c. 169, and 59 Geo. III. c. 87, forces recruited for the East India Company are made subject, before embarkation, to the provisions of the mutiny act for the time, particularly with regard to enlisting and desertion, and with regard to quartering and carriages. If any case should occur with regard to them, it will be necessary to consult those acts and the mutiny act for the time.

(*a*) Not being an officer of marines, in the case of a recruit for the marines.

(*b*) Dow against Drummond, 30th July 1778.

punished by the judge-ordinary for fraud, and, on expiry of their indenture, are liable to serve in the army. Their masters in Scotland may recover them if they were bound for four years, and under certain other conditions as to the execution of the indenture, &c. detailed in the mutiny act. The masters consenting are entitled to receive part of the bounty. Apprentices claimed by the masters are to be committed by a justice for trial. Servants enlisting before expiry of the term of their engagement are, by the mutiny act (though not at common law (a)) validly enlisted; and are entitled to wages to the date of their enlisting, to be modified by the magistrate enlisting them.

Militiamen cannot enlist into the regulars or the East India Company's service; and, at attesting, a declaration is to be read over to the recruit that he is not a militiaman; and if he falsely deny it, he may, on conviction before a justice of the peace, be committed to the gaol or house of correction, not exceeding six months, over and above any other punishment to which he may otherwise be liable. Any person so offending, from the day on which his engagement to serve in the militia ends, belongs to the corps into which he enlisted. And he is liable to serve in the corps of regulars in which he enlisted, within Great Britain and Ireland, while the militia to which he belongs is disembodied, or is not called out for training and exercise.

The following are the articles of war and oath of fidelity before referred to.

*Articles of War, Sect. 2. Art. 3.*—"Any officer or soldier, who shall begin, excite, cause, or join in any mutiny or sedition, in the regiment, troop, or company, to which he belongs, or in any other regiment, troop, or company, either of our land or marine forces, or in any party, post, detachment, or guard, on any pretence whatsoever, shall suffer death, or such other punishment as by a court martial shall be inflicted" (b).

*Art. 4.* "Any officer, non-commissioned officer, or soldier, who being present at any mutiny or sedition, does not use his utmost endeavour to suppress the same, or coming to the knowledge of any mutiny or intended mutiny, does not

(a) Clerk against Murchison, 19th January 1799.—Macdonell against Dixon, 1st March 1805.

(b) *Note*.—Any person attempting to seduce any sailor or soldier from his duty to the public, or to incite him to mutiny, or to any mutinous practice, is guilty of a capital crime, by statute 37 Geo. III. c. 70, made perpetual by 57 Geo. III. c. 7. The offence is punishable arbitrarily at common law.—Hume, i. 520.



“ without delay give information thereof to his commanding officer, shall be punished by a court martial with death, or otherwise, according to the nature of the offence.”

*Sect. 6. Art. 1.* “ All officers and soldiers who, having received pay, or having been duly enlisted in our service, shall be convicted of having deserted the same, shall suffer death, or such other punishment as shall by a court martial be inflicted.”

*Oath of Fidelity.*—“ I swear to be true to our Sovereign Lord King George, and to serve him honestly and faithfully, in defence of his person, crown, and dignity, against all his enemies or opposers whatsoever; and to observe and obey his Majesty’s orders, and the orders of the generals and officers set over me by his Majesty.”

It is a capital crime for any subject of Great Britain to enlist as a soldier with a foreign state without the King’s leave; or for any person to procure such a one to enlist; or to retain or hire such a one with intent to make him to enlist; or to procure such a one to embark in order to be so enlisted; though no enlisting money have been paid. An offence of this class, though committed out of the kingdom, may be tried in any county of Great Britain (*a*). Justices of the peace may arrest those guilty, and prepare for their trial by a higher court. (See *Arrest, &c.*)

## II. PARTICULARS REGARDING SOLDIERS WHEN ENLISTED.

*Canteens.*—Two justices or two magistrates may grant a licence for selling ale, beer, cyder, or perry to any person who holds a canteen under any authority from two principal officers of the board of ordnance, or from the proper officer of the barrack department, without regard to the time of year, or to notices, upon which the person gets the excise licence.

*Carriages and horses.*—The mutiny act directs that carriages and horses for soldiers, quartered or marching in Scotland, shall be provided, &c. as by the laws in force at the Union. By those laws, no officers on their march can seize any horse for their private use, on pain of a month’s pay, to be retained (upon complaint to be made and instructed as under sect. Quartering) off the officer who commands. Where horses are required for the use of the army, they are to be employed and used by order of the commander of the party and of the magistrates of the burgh jointly, if the horses be furnished within burgh; and by the commander and any one of the com-

(*a*) 9 Geo. II. c. 30.—29 Geo. II. c. 17, sect. 4, 6.—Hume, i. 551.

missioners of supply within the shire, when they are furnished and used to landward. And there must be paid for each day that the horses travel 3s. Scots for each two miles to the man and horse, and each day that they do not travel 6s. Scots to the man, and as much for the horse, the man providing himself and the horse; which must be paid by the magistrates if the horses be taken in towns, or if in the country by the collector of supply for the shire, to be repaid or allowed by the receiver-general. The magistrates within burgh, and commissioners of supply, and justices of the peace in landward, must cause provide from time to time a competent number of horses within their respective bounds, for the service of the forces. The officer or soldier must not press any horses without concurrence of the persons above named, or detain them longer than one day's march; but must restore them in good case, under the pain of a month's pay, to be retained in the manner above mentioned off the officer contravening, besides payment of the price of the horse to the furnisher, as the same is instructed before the bailies within burgh, sheriffs, stewarts, bailies of regality, or justices of the peace, in the country (*a*). The same execution is to be granted for payment of carriages furnished to soldiers as for their entertainment in their quarters (*b*). (See sect. Quartering.)

The allowance contained in the old acts cited being now inadequate, there is an allowance made for horse, cart, and man, of 9d. per mile for carrying 15 cwt. and 1s. a mile for carrying 20 cwt. In some parts of the country the old allowance of 1½d. sterling per mile for each horse is added to the new allowance. It is understood that there is hardly an instance now of a horse being pressed without the cart.

*Chelsea.*—By a standing act (*c*), soldiers are entitled in certain cases to relief from Chelsea Hospital, under regulations by the commissioners of that hospital. Any justice of the peace or magistrate, or any receiver-general of the land tax, collector of the customs or collector of the excise, may inquire into the truth of any certificate or voucher required by any such regulations, and produced to him by any person claiming any pension, allowance, or relief, by the oath or affirmation of the person producing it; and, upon being satisfied of the truth of it, may testify upon the back of it, that he is so (*d*).

*Civil power and Courts.*—Soldiers may be proceeded against for ordinary offences, by the ordinary courts of law, like other

(*a*) 1693, c. 4.

(*b*) 1698, c. 9.

(*c*) 46 Geo. III. c. 69.

(*d*) 46 Geo. III. c. 69, sect. 10.

citizens; and, when accused of any capital crime, or of any violence or offence against the person or property of another, punishable by law, must, if possible, be delivered to the civil power by their officers, under the penalty of cashiering, on conviction in any of his Majesty's courts. No person enlisted, except an apprentice, (See sect. enlisting) is liable to be taken out of the service for breach of contract. No person enlisted is liable to be taken out of the service by process, unless for some criminal matter, or unless for a real debt of L.20, ascertained on oath before a judge of the court from which process issues, or before some person authorized to take affidavits in such court, and the oath marked on the back of the process (*a*). The plaintiff may file a common appearance, upon notice in writing to the soldier, personally, or at the place where he resided before enlisting, and may have execution other than against his person.

*Clothes, Forage, &c.*—If any person knowingly receive from any soldier, or other person, any arms, clothes, or other furniture belonging to the King, or any meat, drink, or provisions made to a soldier, or any regimental necessaries, or cause the colour of such clothes to be altered, he forfeits L.5 for each offence; and if any person receive any oats, hay, straw, or other forage, for any horse belonging to the King, from any soldier, knowing him to be such, or assist or entice such person to dispose of such articles, he forfeits L.5 for each offence; on conviction by oath of one witness, before any justice, to be levied by distress and sale, half to the informer, half to the regiment to which the soldier or deserter belonged. Failing distress, or if he do not pay within four days after conviction, the justice may, by warrant under his hand, either commit the person guilty to gaol for three months, or cause him to be whipped. (See *Punishment*.)

*Desertion*.—Any constable of the place where a person suspected to be a deserter is found, or any officer or soldier in the service, may bring him before a justice of the peace living near the place; and if, by his confession, or oath of one witness, or the knowledge of the justice, it appear that he is a deserter, the justice may commit him to prison, and transmit an

(*a*) It has been found in England, that this exemption extends, not to private soldiers merely, but also to serjeants, drummers, and gunners. Lloyd against Woodal, 1 Blackstone, 29. The decisions in England, that a soldier, refusing to pay the aliment of his bastard child, may be attached, as being a criminal matter, K. v. Archer, Hil. 28 Geo. III. 2d Term. Rep. 270; K. v. Bowen, Hil. 33 Geo. III. 5th Term. Rep. 156; Nolen's Rep. 186; would probably not be followed in Scotland. (See *Children*, sect. Alimony of Illegitimate.)

account of it (in a prescribed form) to the secretary at war in London (a). On receiving the authority of the secretary at war, such justice may grant an order on the collector of the land-tax of the place of commitment for a reward of 20s. for each deserter committed, to the person apprehending him. Any person concealing or assisting a deserter, forfeits L.20 on conviction, by oath of one witness, before any justice, to be levied by distress, half to the informer, half to the officer commanding the regiment or corps. Failing distress, or if the person guilty do not pay in four days after conviction, he is to be committed, by warrant under the hand of the justice, to gaol for six months. Any commissioned officer forcibly entering into, or breaking open any dwelling-house or out-house, under pretence of searching for deserters, without a written warrant from a justice of the peace, forfeits L.20. Persons confessing themselves deserters are deemed to have been duly enlisted, though not actually enlisted. Soldiers enlisting in any other regiment are to be deemed deserters, and may be punished by a court martial in such regiment. There are penalties for seducing soldiers to desert; but these are to be sued for in Exchequer. No fee or reward is to be taken by any justice of the peace or his clerk for any information, examination, commitment, or report to the secretary at war, in relation to any deserter.

*Ferries.*—At regular ferries in Scotland, the commanding officer of troops marching may either pass with his party as passengers, or hire the boat entirely to himself, paying in either case half fare. Where there are no regular ferries, officers and soldiers must agree for boats as others.

*Furlough.*—Any inspecting field-officer on the recruiting service, or any officer of the rank of captain, or of superior rank, stationed within the district, or, if there be no such officer within a convenient distance, any justice of the peace, may, by writing under his hand, extend the furlough of any non-commissioned officer or soldier applying, on account of sickness, or other casualty found to render that necessary; and must certify the extension and the cause of it to the commanding-officer, if known, otherwise to the agent of the regiment, in order that the man's proportion of pay may be remitted to him. The soldier, during such extension, is not a deserter. He may be punished if he obtained the extension by false pretences. Such officer or justice of the peace must not extend a

(a) When a *marine* is apprehended, notice is to be sent to the Secretary of the Admiralty.

furlough above a month, without the approbation of the commanding-officer of the district. The subsistence of men on furlough is issued according to regulations established by the King.

*Game and Fish.*—If any officer, without written leave of the person entitled to grant it, take, kill, or destroy any sort of game, or any fish, on conviction, by oath of one witness, before one justice, he forfeits L.5, to be distributed among the poor of the place where the offence was committed.

*Passing wives and children.*—The secretary at war may issue passes to be filled up by justices for enabling the wives and children of soldiers in certain cases to return home (*a*).

The commanding officer of every corps or detachment about to embark for foreign service, or in which soldiers have died on service, leaving widows or children destitute of the means of returning home, is to make a return of such persons, stating the places to which they wish to proceed, and is to give a duplicate to each wife or widow, and child; certifying on it the relationship to the soldier, for the purpose of identification before a justice or magistrate, and the officer is to transmit the returns to the secretary at war (*b*).

The wife, widow, or child, is to take the duplicate to some neighbouring justice or magistrate, who is to fill up an engraved form of pass, bearing the King's arms, signed and sealed by the secretary at war, and transmitted to such justice or magistrate, and who is to certify it, and to make out a route upon it, and to deliver it to such wife, &c. in order that she may receive an allowance not exceeding 1½d. per mile for herself, and 1d. for each child (*c*).

Upon production of such pass to the kirk treasurer (in Scotland) of the place through which the woman is to pass, he is to pay her at the rate specified in the pass to the next city or place to which she may be going, not exceeding 18 miles, and to indorse such payment on the pass, and to take a receipt from the woman, signed with her hand or mark, specifying her husband's corps or detachment, so that the description in the receipt may correspond with that in the pass (*d*). The money so advanced is to be repaid by the collector of excise (*e*).

Where, by sickness or other accident, a wife or child is left at a place of embarkation, or at the last quarters, or on the march to the place of embarkation, and the provisions before mentioned have not been adopted, the officer commanding

(*a*) 58 Geo. III. c. 92, sect. 2.

(*b*) Sect. 3.

(*c*) Sect. 4.

(*d*) 58 Geo. III. c. 92, sect. 5.

(*e*) Sect. 6.

at the place may make the necessary returns to the war office, and give a duplicate, to be of the same effect as before mentioned (*a*).

The pass is to be given up at the last place of receiving allowance before reaching home, or the port of embarkation, and to be transmitted by the kirk treasurer to the collector of excise (*b*).

Where a woman having a pass is detained more than one night at any place by cross winds, sickness, or other reasonable cause, she may apply to a justice, who, if satisfied of the truth of the facts by an examination upon oath, is to give her an order upon the kirk treasurer, or, if at her place of embarkation, upon the district pay-master, for a shilling per day for herself, and sixpence per day for each child mentioned in the pass, so long as she shall be unavoidably detained. And such order, with the receipt of the woman, and the certificate by a magistrate or justice of such detention, is a sufficient voucher; and the money is to be repaid as before mentioned (*c*).

The wives and widows of soldiers having such passes, and not complying with the regulations in the passes and in the act, may be treated as vagrants, and may be passed as such to their homes in Scotland, England, or Ireland, respectively, as if they had not passes (*d*). (See *Poor.—Vagabonds.*)

*Quartering.*—Quartering, or billeting, is directed to be made according to the law of Scotland before the Union (*e*). By that law, all free quartering, and all localities for furnishing forage to soldiers' horses are forbidden. The commissaries are, upon notice from the commanding officer, to have ready fodder in local or transient quarters. Where, from the march being sudden, notice cannot be given to the commissaries, the commanders must buy the fodder with ready money as any others. The officer commanding in chief, in local or transient quarters, must see the whole meat and drink furnished to the soldiers and officers under his command, by the landlords of their quarters, completely paid, at the ordinary rates of the country; and must pay for all of them in ready money, once every week in local quarters, and before removal in transient quarters, if they stay shorter time than a week, under the pain of cashiering, on complaint to the privy council, or to the sheriff or steward, or bailie, or two commissioners of supply of the place, who are to transmit the complaint to the privy council.

(*a*) 55 Geo. III. c. 92, sect. 2.

(*b*) Sect. 2.

(*c*) Sect. 12.

(*d*) Sect. 11.

(*e*) A separate act is passed from time to time for regulating the rates, to be paid to innkeepers, &c. in England, for soldiers quartered there.

If an inferior officer transgress, the commanding officer must pay to the complainant what is due, if demanded within eight days after a week's quarters are owing, or other abuse committed, and in transient quarters before removal; of which demand it is sufficient evidence that it be made before a magistrate within burgh, a justice of the peace, or two witnesses. Though the eight days have elapsed, those wronged may still use legal means against the party immediately liable. Discharges to the soldiers must be subscribed by the master of the ground, or his chamberlain, or the officer of the ground, before two witnesses, or a magistrate within burgh. If any officer or soldier do not make due payment of what he takes on in quarters, or commit any abuse in quarters, the landlord upon whom he was quartered may instruct, before a justice of the peace, magistrate, or the next heritor, by witnesses, or the oath of the party injured, the amount taken on, or damage done, who are to give the landlord a declaration of the value; on production of which, it will be allowed out of the fore-end of his cess or excise; and if the landlord be a tenant or other person not paying cess or excise, the heritor is to have allowance, and is to pay it to him; to be certified by the collector of cess or excise to the paymaster, that it may be deducted off the pay of the officer or soldier (*a*). Neither in local nor transient quarters can the landlord be obliged to furnish common soldiers with coal or candle, except according to the ordinary condition of the house, and after the manner of the ordinary domestics. Soldiers committing abuses in local or transient quarters may either be complained of to their officers, or summarily before the justices of the peace, or the ordinary judges of the bounds; before whom the officer must assist them. Soldiers, in their local quarters, must only be quartered in royal burghs, or burghs of regality, or the most capable market towns, within the shire, not in dispersed onsteads in the country (*b*). Justices of the peace may quarter soldiers on the householders in country villages indiscriminately, with the exception of schoolmasters, widows, or unmarried women, and paupers (*c*). The magistrates may do the same in royal burghs, with the same exceptions (*d*). When the circumstances of the country require that a great number of soldiers be quartered in a particular district, the exemptions should be much narrowed; even unmarried women may be quartered on (*e*).

(*a*) 1693, c. 4.

(*b*) 1693, c. 5.

(*c*) Crawford against Wilson, 3d June 1794.

(*d*) Aitchison against Magistrates of Haddington, 31st May 1790.

(*e*) Boswell against Magistrates of Cupar, 10th July 1804.

By the mutiny act, no officer is to pay for lodging where he is regularly billeted, except in the suburbs of Edinburgh.

Government now give an allowance to the houses on which soldiers are billeted. The allowance is at present 1s. 6d. a-week for two men, if they remain so long, and 2d. a-night for two men for a shorter period (*a*).

*Toll-dues.*—By the mutiny act, officers and soldiers on duty, or on their march, and carriages and horses belonging to the King, or employed by him, or conveying soldiers, women, &c. belonging to the forces, or arms, accoutrements, tents, baggage, ordnance, &c. are free from toll, under any act for repairing any road or bridge, unless such act specially provide that there shall not be such exemption; but vessels conveying soldiers, women, baggage, &c. along a canal, pay canal dues. A similar exemption to horses, carriages, &c. conveying soldiers, &c. is conferred by the general turnpike act for Scotland, 4 Geo. IV. cap. 49; to which reference is made (see *Highways*, sect. Exemptions from Toll-dues).

It may be mentioned that the following order was issued, after consulting the King's counsel, relative to the clause which is always inserted in the mutiny act, conferring upon military officers on duty an exemption from toll; and which still regulates the practice upon this point.—“Adjutant-General's Office, Edinburgh, 27th July 1810.—Memorandum. —“All officers being in uniform, or in great-coats with their “sashes and swords on,” [by practice, commissioned officers of dragoons, whether light or heavy dragoons, are not required to wear sashes except when in full dress], “or army medical “officers wearing their swords, who claim to be exempted from “paying toll, must be presumed to be on duty, within the intent and meaning of the act, and are not bound to answer “interrogatories by the turnpike men, touching the nature of “the duty on which they are employed.—All officers in “coloured clothes, or without swords, are evidently not on “duty, and are liable to pay all tolls or the penalties for evading the same.”

*Trades.*—An act of Parliament is passed from time to time, usually at the end of every war, enabling seamen, soldiers, and marines, who have been in the King's service, and have not deserted, and also their wives and children, to exercise trades in any part of the kingdom, notwithstanding the privileges of corporations in boroughs, &c. The last act extends the privilege to militia men and fencibles who have served five

(*a*) There is no allowance yet for marines.





years and have been discharged (a). This matter, however, does not seem to fall within the cognisance of justices of the peace.

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### SPIRITUOUS LIQUORS.

By the small debt act, under which alone action for the price of spirituous liquors would naturally have been competent before the justices, such action is expressly excluded. (See *Small Debt Act*, sect. Causes Competent).

By the act 24 Geo. II. c. 40 (sometimes called the tippling act) which is applicable to all courts, and is applied daily, no person has action for any debt on account of spirituous liquors, unless it have been *bona fide* contracted at one time to the amount of twenty shillings; and no article in any account for such liquors is allowed, where the liquors delivered at one time, and mentioned in such article, do not amount to twenty shillings, without fraud, and where no part is to be returned. And if any retailer of such liquors receive any pawn for the price, he forfeits forty shillings for every pawn, to be levied by warrant of a justice of the peace for the place; one half to the poor of the parish, the other to the informer; and the owner recovers his pawn (b).

By the same act, no licence must be granted for retailing spirituous liquors in any gaol, house of correction, or house for parish poor. And if any officer of such gaol, &c. sell, use, lend, or give away, or knowingly permit any spirituous liquors to be sold or given away, in any such gaol, &c. or brought into the same, other than such as are prescribed by a regular physician, from the shop of a regular apothecary, he forfeits L.100 on prosecution in Exchequer (if in Scotland) for the first offence, and forfeits his office for the second (c). Any justice of the peace, upon information on oath that such liquors are disposed of in any gaol, &c. may enter and search, or, by warrant, may empower a peace officer to enter and search, and, if such liquors be found (except as above) to seize and immediately destroy them (d). If any person bring, or attempt to bring, any such liquors (except as above,) into

(a) 56 Geo. III. c. 67.

(c) *Ibid.* sect. 13.

(b) 24 Geo. II. c. 40, sect. 12.

(d) *Ibid.* sect. 14.

any gaol, &c. the officer of such may carry him before a justice of the peace, who may convict him on oath of one witness, and thereupon commit him to prison, or to the house of correction, not longer than three months, unless he immediately pay a fine not less than L.10, nor exceeding L.20, half to the informer, half to the poor of such gaol, &c. (a). The chief officer of every gaol, &c. must hang up a fair copy of the three preceding clauses in a conspicuous part of the jail, &c. and renew it when necessary, under a penalty of forty shillings for each default, to be levied by warrant of a justice of the peace for the place, on summary conviction by oath of one witness; and any justice may enter and demand a sight of such copy; and, if not immediately shewn legible, may instantly convict; half of the penalty to the informer, half, or the whole, if no informer, to the poor of such gaol, &c. (b). (See *Alcouses*).

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### SPUILZIE.

SPUILZIE (civil actions upon which, for the value and the violent profits, may occur before justices under the small debt act) is the taking away or meddling with moveable goods in the possession of another, without either that person's consent, or the order of law. Action lies not only for restoring the goods, or their value, but for the *violent* profits; that is, all the profits which the owner might have made, if he had not been deprived of the goods; which are estimated by his oath (c). (See *Pragf*, sect. Oath in *Item*, & *Prescription*, sect. Three years.)

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### STAGE COACHES.

THE regulations upon this subject are contained in a recent act, which repeals former acts (d). And a subsequent act

(a) 24 Geo. II. c. 40, sect. 15.  
(c) Erskine, III. 7. 16.

(b) Sect. 16.  
(d) 50 Geo. III. c. 43.

has been passed applicable to stage coaches drawn by one horse or mule (*a*).

**I. NUMBER OF PASSENGERS, AND THEIR PLACES, MARKING, NUMBER, AND OWNER.**

Any coach, berlin, &c. or other carriage with four or more wheels, employed as a public stage coach or carriage, and drawn by four or more horses, may carry ten outside passengers, and no more, excluding the coachman, but including the guard, where there is a guard. One passenger and no more may sit upon the box with the coachman (this regulation is not limited to stage coaches drawn by four horses, as appears from other passages of the act, particularly sections 8 and 14, afterwards quoted); three passengers on the front of the roof; and the remaining six behind, in the manner the most safe and convenient for them; but no passenger must sit on the luggage, or the part of the roof allotted for it. All stage coaches, or other carriages above described, drawn by two or three horses, may carry five outside passengers, excluding the coachman. Long coaches, or double bodied coaches, may carry eight outside passengers, and no more, excluding the coachman, but including the guard where there is one; all under the penalties imposed for carrying more outside passengers than allowed by this act, to be levied as after mentioned. A child in the lap, or under seven years, not to be accounted a person, but two such to be accounted a person. No person, paying as an outside passenger, to be an inside passenger, unless with the consent of one inside passenger, next whom he is to be placed. Where such coach or other carriage is of a construction peculiarly wide, and being so found is duly licensed for the purpose, four outside passengers, instead of three, may sit on the front; but the outside passengers must not exceed ten in all (*b*).

The number of passengers permitted to be carried is to be specified in the license (*c*).

Every person licensed to keep such coach, &c. (except mail coaches) must have painted on the outside of each door of such carriage, or on some other conspicuous place, in legible characters, at least an inch long, in different colour from the ground, and in words at length, the number of outside as well as of inside passengers which the carriage is licensed to carry, with the name or firm of the owner or owners. The commission-

(*a*) 7 Geo. IV. c. 33.

(*b*) 50 Geo. III. c. 48, sect. 2.

(*c*) Sect. 6.

ers for granting licenses may order a brass plate on the side of each coach, with the owner's name, &c. instead of the above description. If any person be licensed to keep more than one such carriage, they must have several numbers or other marks to distinguish them from each other. If any person injure, alter, or deface the number, figure, or mark of distinction, appointed by the commissioners, he forfeits L.5 for each offence. And if any person use such carriage for carrying outside passengers for hire without a license, or without the proper markings upon the carriage, or carry more outside passengers than contained in the license, and marked on the carriage, he forfeits for each offence L.10 for each outside passenger beyond the number allowed, and double that sum if the driver be owner or part owner, to be recovered and applied as other penalties under this act. Every inscription or plate to be considered sufficient evidence of the party who is owner (*a*).

If the driver of such carriage conveying a greater number of passengers, inside or outside, than hereby allowed, or permitting more than one person to sit upon the coach box, is not known, or cannot be found, the owner, or any of the owners, is liable to the penalties, as if they had been the drivers. But if the owner satisfy the judge, by sufficient evidence, not resting on his own testimony, that the offence was committed without his privity or knowledge, without any profit or advantage to him, and contrary to the duty of the driver, the judge must discharge the owner, and levy the penalty on the driver when found; and such driver, failing to pay the penalty, is to be imprisoned in the gaol of the place where the offence was committed not more than six months, nor less than three, at the discretion of the judge (*b*).

All stage coaches (long bodied coaches included) carrying no parcels or luggage except in the inside or in the front boot, or in a boot behind or under the body of such carriage, and where the top of the boot behind, when the coach is empty, is not more than six feet from the ground, having obtained a special licence for that purpose, and having the name of the owner, and the number of outside and inside passengers thereby allowed, inscribed on it, may carry two outside passengers more than otherwise allowed (*c*).

No driver or owner of any stage coach or carriage, before described, must permit any person to go as a passenger about the outside of it, if its top be more than eight feet nine inches

(*a*) §0 Geo. III. c. 48, sect. 7.

(*b*) Sect. 8.

(*c*) Sect. 21.

from the ground, or if there be a smaller distance than four feet six inches from the centre of the track of the off wheel to the centre of the track of the near wheel, under the penalty of L.5 for each offence, to be recovered and applied as penalties for too many outside passengers (*a*).

Persons licensed to keep carriages or vehicles for conveying passengers for hire at separate fares, having four wheels, and drawn by one horse or mule only, are not to carry "therein" or thereby more than six passengers, or having two wheels, and drawn by one horse or mule only, are not to carry "therein" or thereby more than four passengers (*b*), under a penalty of L.80 (*c*), which may be mitigated to one fourth, besides costs and charges of the officers and informers in making the discovery and in prosecuting (*d*), to be imposed by any justice of the peace of the place of the offence (no other magistrate is mentioned in the act), who is to summon the accused and the witnesses, and upon confession or proof by one credible witness to give judgment for the penalty, and to issue warrant for levying it on the goods of the offender, if not redeemed within 5 days, and, if sufficient goods cannot be found, is to commit the offender to prison, not exceeding six months, unless the penalty be sooner paid, and which judgment (upon security being found for the penalty and costs) may be appealed to the quarter sessions (*e*). Carriages, horses, &c. are liable to be distrained for the penalty (*f*). Witnesses not attending incur a penalty of L.5 (*g*). Information may be laid by any person; and if the information be laid within six months after the offence, half of the penalty goes to the King, half (with full costs of suit) to the informer; and if beyond six months, the whole to the King (*h*). The justice is to receive the King's share, and to pay it at the next general quarter sessions into the hands of the clerk of the peace, who is to transmit it, without fee, to the solicitor of stamps; and the justice, on making such payment, is to transmit to the solicitor of stamps a schedule, containing the names, dates, offences, and sums of the convictions (*i*). A form of conviction is given in the act (*j*). A justice of the peace will have the act produced to him, when he is to proceed upon it.

## II. HEIGHT AND PLACE OF LUGGAGE.

No luggage exceeding two feet in height is to be carried

(*a*) 50 Geo. III. c. 48, sect. 3.

(*b*) 7 Geo. IV. c. 33, sect. 2.

(*c*) Ibid. sect. 11.

(*d*) Ibid. sect. 21.

(*e*) Ibid. sect. 18.

(*f*) Ibid. sect. 19.

(*g*) Ibid. sect. 20.

(*h*) Ibid. sect. 22.

(*i*) Ibid. sect. 23.

(*j*) Ibid. sect. 21.

upon the roof of any such coach, mail-coach, or other carriage drawn by four horses, or eighteen inches if drawn by two or three horses. Every driver allowing the contrary, or the owner, where the driver is not known or cannot be found, being convicted by his own confession, or the view of a justice of the peace or other magistrate, or the oath of one credible witness, before any justice of the peace, or other magistrate, acting in and for the county, city, town, or place where the offence is committed, forfeits L.5 for each inch above the height allowed; and if the driver be the owner, L.10; and in default of payment of those penalties, the person convicted is to be committed to the jail or house of correction of the place for two months, unless sooner paid. Packages must be placed on the roof of such coach, mail, or other carriage, so that no passenger shall sit on them, under the penalty of 50s. for each offence, to be paid by such passenger, to be recovered and applied as other penalties. The division on the top of the carriage allotted for luggage, must be distinctly separated from the rest of the top, by a railing or otherwise. If any driver, owner, or part owner, refuse to permit the carriage and luggage to be measured by any justice of the peace, magistrate, constable, surveyor of any highway or turnpike road, inspector of coaches, duly authorized by the commissioners of stamps, or passengers, he forfeits "the like penalty," (which seems to be the penalty of 50s. last mentioned), to be recovered and applied as after specified (a).

Luggage may be carried of a greater height than two feet from the roof, if the top of such luggage be not more than ten feet nine inches from the ground (b).

No driver or owner of any stage coach or carriage, before described, must permit any luggage to be carried on the roof of it, if its top be more than eight feet nine inches from the ground, or if there be a smaller distance than four feet six inches from the centre of the track of the off wheel to the centre of the track of the near wheel, under the penalty of L.5 for each offence, to be recovered and applied as penalties for too many outside passengers (c).

### III. COUNTING AND MEASURING.

If the driver of any such coach, &c. drawn by two or more horses, suffer more than one person on the coach-box beside himself, or more outside passengers than by this act allowed, or luggage higher than by this act allowed, any outside or in-

(a) 50 Geo. III. c. 48, sect. 4.  
(c) Ibid. sect. 2.

(b) Ibid. sect. 1.

side passenger, who has been regularly booked, who has paid, and who is travelling by such carriage, may require the driver to stop at any toll, and the toll collector to count the passengers, or measure the luggage; and if the driver refuse to stop, and to allow the passengers and luggage to be examined, he forfeits L.4 for each refusal, and if more passengers have been carried, or higher luggage, than allowed by this act, he forfeits double the penalty imposed by this act for such offence, half to the toll collector, half to the passenger; and if any toll collector, so required, neglect or refuse to make such examination, he forfeits L.5 for each offence, to be recovered as other penalties hereby imposed; and if any person endeavour to evade such examination, by descending before coming to the toll, and re-ascending after passing it, he forfeits L.10, to be recovered as other penalties hereby imposed (*a*). (See sect. Height, &c. of Luggage.)

#### IV. LEAVING HORSES, ENDANGERING, DELAYING, EM- BEZZLING, INSULTING, OVERCHARGING, FIRING, &c.

If the driver of any such coach, &c. stopping at any place where assistance can be procured, quit his horses, or the box, before a proper person hold the fore horses, or if such person quit actual hold of the horses before the driver return to his box, or before the post-boy who rides one of the horses be again mounted, and have in his hands the reins which guide those horses, such driver or person, on conviction by confession, the view of a justice or other magistrate, or the oath of one credible witness, before any justice or other magistrate of the place, forfeits not more than L.5, nor less than 10s. for each offence. Hackney-coaches drawn by two horses are excepted (*b*).

If the driver of any such coach, mail-coach, or other carriage, above described, or the person acting as guard, by misconduct, endanger the safety of the passengers or their property, or do not give due care to any property entrusted to them; or if the driver of any mail-coach, or any guard, wilfully lose time, so as to retard the mail; or if the driver of any mail-coach do not convey the mails at the speed prescribed by the postmaster-general, unavoidable accidents excepted; or if the driver or guard of such coach, &c. do not duly account to his employers, or those authorized by them, for money received for conveying passengers or parcels, such driver or guard, on conviction by confession, the view of a justice (in any case applicable thereto) or the oath of one credible witness, before any

(*a*) 50 Geo. III. c. 48, sect. 14.

(*b*) Ibid. sect. 10.

justice or other magistrate of the place, forfeits not more than L.10, nor less than L.5, for every offence, and must return the money embossed; and, in case of non-payment, may, by such justice, &c. be committed to the jail or house of correction of the place, for not more than six months, nor less than three months, at his discretion (*a*). And, by a later act, it is provided, in extension of the preceding enactment in reference to coachmen, &c. endangering passengers, that, if the coachman, guard, or other person having the care of any such coach, mail-coach, or other carriage before referred to, or employed about it, do, "by intoxication, or wanton and furious driving, or any other wilful misconduct on the public highway, injure or endanger any person or persons whatever in his, her, or their life or lives, limbs, or property," the offender is, for every offence, to be liable to the same penalty, to be levied, mitigated, and applied, in the same manner as has just been mentioned (*b*). (See sect. Criminal Prosecutions for injury to passengers.)

If the driver or guard of any such coach, or other carriage, insult any passenger, or exact more than the sum to which he is entitled, he forfeits, on conviction by confession, or oath of one credible witness, before any justice or other magistrate of the place, not more than 40s. nor less than 5s.: and, on non-payment, may be committed to the jail or house of correction of the place, for not more than one month, nor less than three days, at the discretion of the judge (*c*).

If the coachman, or person having the care of any coach, mail-coach, or other carriage before described, permit any other person to drive it, without the consent of a proprietor, or against the consent of the passengers, or quit the box without reasonable occasion, or for longer time than necessary (although the reins be in the hands of the passenger on the box) or if, by furiously driving, or any negligence or misconduct, he overturn the carriage, or endanger the persons or property of the passengers, or the property of the owners, for every such offence he forfeits not more than L.10, nor less than L.5, to be recovered and applied as other penalties by this act (*d*).

The guard of any such coach, or mail-coach, firing off his arms while such coach is on the road, or in any town, except for the defence of it or of the passengers, forfeits for each offence L.5, to be recovered and applied as other penalties by this act (*e*).

(*a*) 50 Geo. III. c. 48, sect. 11.

(*c*) 50 Geo. III. c. 48, sect. 12.

(*e*) Ibid. sect. 18.

(*b*) 3 Geo. IV. c. 95, sect. 11.

(*d*) Ibid. sect. 15.



## V. CONNIVING.

If any person receive money for conniving at any offence prohibited by this act, on conviction before one justice or other magistrate above mentioned, he forfeits L.50 for each offence ; and, in default of payment, is to be committed to any house of correction, not exceeding three months, nor less than one month (*a*).

## VI. PROCEDURE, GENERAL PENALTY, &amp;c.

Leaving the original summons, or a copy of it, with the known or acting book-keeper of the coach, &c. in any place through which it passes, is sufficient service against the driver or owner complained upon (*b*).

Where any penalty imposed by this act is recoverable before one justice of the peace, or other magistrate, as before mentioned, he is to administer an oath ; and, on proof of the offence, is to give judgment for the penalty, and for the reasonable expences of the prosecution : and if they be not paid, he is to commit the person convicted to the common jail or house of correction of the place, not exceeding three months, nor less than one, at his discretion, unless such person enter into the recognizance after mentioned (*c*).

If any person commit any offence against this act, for which no specific penalties have been provided, he forfeits not more than L.10, nor less than 50s. on conviction, on the oath of one credible witness, before any justice of the peace or other magistrate acting in, and for the county, city, town, or place where the offence was committed, or for any place in which the offender is actually present ; and in default of payment, the offender, for every offence, is to be committed to the common jail or house of correction of the place where the offence was committed, or where he is actually present (as the case may be) not exceeding three months, nor less than five days (*d*).

The judge, if he see cause, may mitigate any penalty to a sum not exceeding one-half, over and above all reasonable expences of the prosecution ; and one-half of the sum imposed as penalty, with the expences, is to be paid to the informer (except where specially provided otherwise) the other half to the trustees of the roads of the place where the offence is committed, who are required, in consideration thereof, to direct their surveyors to watch over the due execution of this act (*e*):

(*a*) 50 Geo. III. c. 48, sect. 20.

(*b*) Ibid. sect. 18.

(*d*) Ibid. sect. 19.

(*b*) Ibid. sect. 9.

(*e*) Ibid. sect. 17.

Prosecutions must be commenced within fourteen days after the offence; and there can be but one recovery for the same offence, except where the owner is required to have his name or sign painted on the coach, and to preserve the same legible: in which case, the prosecution may be commenced at any time; and a neglect to remedy the defect for one month is considered a new offence (*a*).

Forms of proceeding are given in the act. In Scotland, the forms usual in summary proceedings before justices may be used. No objection for want of form is to be admitted. The conviction is to be final, unless appealed from within fourteen days, as after mentioned (*b*).

The person convicted, who enters into a recognisance, with one sufficient security, before the judge convicting him, that he shall appear at the next quarter sessions of the place of conviction, and abide the final order of that court, may appeal to those quarter sessions; who, upon hearing the appeal, are finally to dispose of it, and to award such expences to the prosecutor or appellant as they may see proper; and their judgment is final and conclusive (*c*).

If any constable, or other peace officer, refuse or neglect to execute any warrant granted by any justice of the peace, or other magistrate, under this act, on conviction, before one justice or magistrate of the place, by confession, or oath of one witness, he forfeits L.5 for each offence; and if he do not immediately pay or secure this penalty, he may be committed by the judge to the jail or house of correction of the place, for any time not exceeding one month, unless the penalty be sooner paid (*d*).

For the penalty, procedure, &c. in the case of stage coaches drawn by one horse or mule, see sect. Number of Passengers.

#### VII. CRIMINAL PROSECUTIONS FOR INJURY TO PASSENGERS.

Drivers of stage coaches or carriages who occasion maiming or other injury to passengers, by furious driving or wilful misconduct, are declared guilty of a misdemeanor, and punishable by fine and imprisonment. This provision does not extend to hackney coaches drawn by two horses and not plying for hire as stage coaches (*e*). All such offences are punishable at common law in Scotland.

Justices seem competent to punish more venial offences of this description, and may prepare more aggravated cases for trial before a court of more extensive powers. (See *Arrest, &c.*)

(*a*) 50 Geo. III. c. 48, sect. 32.

(*c*) Ibid. sect. 25.

(*e*) 1 Geo. IV. c. 4.

(*b*) Ibid. sect. 24.

(*d*) Ibid. sect. 13.

See *Highways*, &c. sect. Preserving Order.—*Location*.—*Nuisance*, &c.—*Damages*, sect. Delict or neglect of duty by servant.

### SUBMISSION.

A **SUBMISSION** is a contract, by which parties, having debatable rights or claims, refer their difference to the final determination of one or more arbiters (*a*).

As arbiters have no power of jurisdiction, if witnesses refuse to depone before them, or possessors of writings to produce them, application must be made to the Court of Session (*b*), or to the judge ordinary of the bounds (*c*). For the same reason, if either of the submitters refuse to implement the decree-arbitral, action for implement of it must be brought before the judge competent (*d*), which justices seem to be under the small debt act; but if parties have consented to registration of the decree for execution (which is not competent in the books of justices) diligence may pass on this constructive decree (*e*).

The decret-arbitral, though erroneous, is conclusive of the question, unless reduced in the Court of Session, for corruption, bribery, or falsehood (*f*). (See *Transaction*.)

### SURETY OF THE PEACE.

ANY one justice of the peace may, by warrant, bring before him those "who, to any one or more of our people, concerning "their bodies, or the firing of their houses, have used threats," and lay them under surety of the peace (*g*). He may also, on complaint of any person threatened, and fearing to be wronged, and on oath by such person that he has just cause of fear, lay the person complained of under surety of the peace, in a suitable penalty (*h*). Although no person complain, if

(*a*) Erskine, iv. 3. 29.

(*b*) Harvey, petitioner, 6th July 1826.

(*d*) Erskine, iv. 3. 31.

(*g*) Commission of the peace (See *Justices*).

(*b*) *Ibid.* 31.

(*e*) *Ibid.*

(*f*) *Ibid.* 35.

(*h*) 1661, c. 38.

the justice be credibly informed of appearance of trouble between parties, he may bind them to the peace in the same manner, unless they declare upon their consciences that neither of them bears any grudge to the other (*a*). But it is better that there should be a complainer. (See *Parties*, sect. Prosecutor.—*Process*, sect. Criminal.)

In case of an affray having actually commenced, or in case of violent threats of immediate mischief in his presence, the justice may, himself, instantly apprehend the delinquent, or cause others to do so by verbal instructions to that effect (*b*).

The period for which a person may be required to find surety is discretionary. But, in a late case, in which a baillie of a borough had committed a person till he should find caution, "to abstain from any such breach of the peace or good order," "in time to come," the Court of Justiciary expressed very strong opinions that there is no authority in the law of Scotland for demanding such caution for so long a period; and that the period should, in no case, exceed a few years (*c*). It is usually for one, two, or three years, and sometimes four or five years. The period runs from the date of the sentence, or from the date of the expiry of the imprisonment directly in person, where such punishment has been imposed.

Where the person ordained to find this surety fails to find a sufficient cautioner to the amount required, he may be instantly committed to prison, and detained till he find such (*d*). But where he cannot find it during the period for which he is ordained to find it, he is entitled, on expiry of that period, to be liberated (*e*). No person can be fined for not giving caution to keep the peace; the only course is commitment (*f*).

The bond of surety should bear the name and designation both of the principal and of the cautioner; and should bear to be for keeping the peace. It should be kept by the justice, and delivered to the clerk of the peace at the next sessions, to be kept and registered by him (*g*).

The penalty in the bond is forfeited, if the person be proved before the justices to have been afterwards guilty of actual violence to another, either by himself, or by others instigated by him; or of any other breach of the peace, to the terror of any of the people (*h*).

(*a*) 1661, c. 38.

(*b*) Hume, ii. 72.

(*c*) Binny against Davidson, 24th December 1812.

(*d*) 1661, c. 38.—Commission of the Peace.

(*e*) Petition, Thomas Thomson, 15th Nov. 1815, *Justiciary Records*.

(*f*) *Justices of Peace of Wigton against Martin*, 9th Nov. 1710; *Forbes*.

(*g*) 1661, c. 38.

(*h*) Burn,  *voce*  Surety of Peace.

When a person's cautioner proves insufficient, or when a person is convicted, in course of law, of having broken a prior surety of the peace, he may be put under surety again.

#### FORMS OF PROCEEDINGS.

##### 1. *Petition.*

" Unto the honourable his Majesty's justices of the peace for  
" the county of M.

" The petition of A B, procurator-fiscal of court, for the  
" public interest,

" Humbly sheweth,

" That the petitioner has received information, and has reason to believe that C D and E F" [design them] " bear such malice and resentment against each other, that there is cause to apprehend their being guilty of a breach of the peace; in  
" so far as" [mention shortly the information received, or as the case may be.]

" May it therefore please your honours to grant warrant to  
" bring the said C D and E F before you for examination; and, thereafter, to grant warrant for committing  
" them to the tolbooth of , till they shall find  
" caution, acted in your honours books, to keep the peace"  
[or as the case may be.]

" A B, P. F."

##### 2. *Warrant to arrest.*

[Place and date.] " The justice, having considered this  
" petition, grants warrant to constables" [or as the case may be] " to apprehend the said C D and E F, and to bring them  
" before any of the said justices for examination.

" G H, J. P."

[Where the delay of waiting for an application by the procurator-fiscal may be attended with any material risk of the parties committing a breach of the peace in the mean time, a justice may of his own motion grant warrant to arrest in such terms as the following.]

K k

"Whereas G H, one of his Majesty's justices of the peace for the county of M, has received information, and has reason to believe," &c. [as above] "the said justice hereby grants warrant," &c. [as above.]

### 3. *Declarations.*

"Compared C D" [design him] "who being examined by the justice, declares," &c. [to be subscribed by him and the justice.]

"Compared E F," &c.

[The declarations are written on separate papers.]

### 4. *Order to find surety.*

"The justice having resumed consideration of the foregoing petition, and having considered the declarations of the said C D and E F; in respect of the facts admitted by them," [or as the case may be] "grants warrant to constables" [or as the case may be] "to commit them prisoners within the telbooth of , the keepers whereof are hereby ordered to receive and detain them, until they find sufficient caution acted in the justice of peace court books of M, that they will keep the peace for from this date, under the penalty of pounds sterling" [or as the case may be.]

"G H, J. P."

[Sometimes, upon considering a complaint and inflicting punishment, the justices] "farther discern and ordain the said C D, defender, to find sufficient caution acted in the justice of peace court books of M, to keep the peace for from this date" [or "for from the expiry of the term of his imprisonment contained in this sentence"] and that under the penalty of ; and grant warrant to constables to imprison him in the telbooth of , the keepers whereof are hereby ordered to receive and detain him till he find such caution."

"G H, J. P."

"J K, J. P."

5. *Surety.*

[This is in the same form as bail; a slight alteration only being necessary on account of the difference of the object.]

See *Surety for the Good Behaviour.—Threats.—Laws, borrow.*

## SURETY FOR THE GOOD BEHAVIOUR.

THIS agrees in its general nature with *Surety of the Peace*, but is more extensive, and comprehends it.

The general Scots statutes direct, that when “any suspicious persons, who are night walkers” (i. e. who sleep in the day, and walk in the night) “and cannot give a good account “of themselves,” are brought before a justice, he shall ordain them to find caution for their good behaviour; and, if they do not, shall commit them to prison (a). The suspicion, however, must not be causeless, but resting on probable grounds (b), Suspicious night-walkers are described by the English authors to be night-walkers who are suspected to be pilferers, or otherwise like to disturb the peace, or who are persons of ill behaviour, or of evil fame or report generally, or who keep company with any such, or with any suspicious persons in the night; or who are eves-droppers, that is, who at night listen about the doors or windows, or under the eaves of houses, to hearken after discourse, and raise mischievous tales; or who throw men’s carts, gates, or the like, into ponds, or commit other outrages or misdemeanours in the night (c). An old English statute, which, as it concerns the peace, is perhaps communicated to Scotland (d), directs justices to “take of “all them who be not of good fame, where they shall be found, “sufficient surety and mainprize of their good behaviour towards the King and his people” (e). As the extension of this act to Scotland, however, is doubtful, and as the English authorities are much divided as to what shall constitute “not

(a) 1617, c. 8.—1661, c. 38, sect. Instructions to Constables.

(b) Williams’ Justice, Arrest.—Lord Raymond, ii. 1301.

(c) Dalton.—Williams’ Justice. Surety for the Good Behaviour.—Burn’s Justice, Eves-droppers.

(d) 6 Anne, c. 6.

(e) 34 Edward III. c. 1.

"of good fame" (*a*), it seems sufficient to have mentioned it, with this caution. The commission of the peace directs any one justice to exact either surety of the peace, or for the good behaviour, from "those who, to any one or more of our people, concerning their bodies, or the firing of their houses, have used threats" (*b*). Some statutes, with regard to certain offences, specially appoint that persons convicted shall be laid under surety for good behaviour. Sometimes, at common law, an order to find such surety makes part of the judgment upon a person convicted of a punishable offence against public decorum and comfort.

This surety is forfeited by any thing which infers a forfeiture of surety of the peace; also, by seditious words; by words of heat, as knave, rascal, liar, drunkard, when used to a justice of the peace in the execution of his office, but not, in general, when used to a private person; by going armed with great numbers, to the terror of the people; by being guilty of any misdemeanour, intended to be prevented by such surety; by being again guilty of an offence for which this surety has been properly exacted; but not for barely giving cause of suspicion of what perhaps may never actually happen; nor for many suspicious circumstances, for which it may be exacted (*c*).

A justice cannot be too cautious with regard to this surety. "It is become difficult," says Dr Burn, "to define how far it shall extend, and when it shall stop." There are doubts as to several cases, whether it may be exacted in such, or forfeited in such. And unless the case be either pointed out by statute, or laid down by good authority, and supported by natural justice, and not resting merely upon vague rumours and suspicions, perhaps a magistrate will hesitate in requiring this surety.

See *Surety of the Peace*.—*Lawborrows*.

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### TACK.

JUSTICES of the PEACE seem competent, under the small debt act, to actions for rent, or other pecuniary claims arising

(*a*) See Burn, *Surety for the Good Behaviour*.

(*b*) Commission, first assignment (see *Justices of the Peace*).

(*c*) Burn, *Surety for the Good Behaviour*.—*Williams*, *Ibid*.



from tacks, where the right to the lands or tenements themselves is not questioned. (See *Small Debt Act*, sect. Causes Competent.) But as the principal actions with regard to tacks, *e. g.* sequestrations and removings, are not competent before them, and as questions under the small debt act occur only in leases of inconsiderable subjects, the terms of which are commonly simple, a very few general remarks will suffice.

A tack, or lease, is a contract of location, by which the use of land, or any other immoveable subject, is set to the lessee or tacksman, in consideration of a determinate rent or duty, to be paid or performed to the lessor or landlord, either in money, the fruits of the ground, or services (*a*). The essence of it consists in the subject to be let, the term of possession, and the rent; all of which must be fixed by the parties.

#### I. FORMATION.

Where the tack is to be for a period not exceeding one year, it may be verbal (*b*); and admits of proof by witnesses. If the parties have communed verbally for a tract of years, the landlord seems not to be bound to give possession, nor the tenant to enter, even for one year (*c*), as the terms of a long lease are generally very different from those of a lease for a year. A verbal communing for one year is not binding till it be reduced into writing, if parties have agreed that that should be done. A verbal agreement, during the first year, for a second, is binding.

Where the lease is for more years than one, it must be in writing (*d*). Possession does not render a verbal tack for a term of years binding. The tenant may be removed at the end of any year, upon due warning (*e*). When so removed, he must pay rent at the rate fixed. Even improvements in the way of better culture and management, if of an ordinary nature, are not sufficient to render it binding; but it is otherwise, if the improvements be of a more extensive nature, such as are referable only to a bargain for a term of years; for these should not have been permitted, unless the bargain were to be implemented; or if a grassum have been given (*f*). But it appears that even in such circumstances, a tack for a term of years cannot be proved by witnesses (*g*). Where the writing

(*a*) Erskine, ii. 6. 20.

(*b*) Ibid. 30.

(*c*) Stair, ii. 9. 4.—Bankton, ii. 9. 5.

(*d*) Erskine, ii. 6. 30.

(*e*) Keith against Johnston, 16th July 1636, Durie.—Stewart against Leith, 25th November 1766.—Buchanan against Baird, 15th December 1773.

(*f*) Macrorie against Macwhirter and Gray, 18th December 1810,

(*g*) Neil against Earl of Cassillis, 22d November 1810.

is to give possession, it must be regular and probative (*a*), and signed by both parties. It seems to be the general tendency of the decisions, that possession does away any objection from informality, if the essentials were clear. The lease may be entered into by a missive or memorandum (*b*). It is rendered void by fraud, or by error in any of the essentials.

For *Tacit Relocation*, see sect. Termination.

## II. OBLIGATIONS.

### 1. Of Landlord,

The landlord must put the tenant into possession at the stipulated or understood term. Whitsunday (legally 15th May (*c*)) is the usual term in leases of houses, and in pasture farms. The separation of the crop is the common term in arable farms. Martinmas (legally 11th November (*d*)) is sometimes observed as a term. The usual clause in leases comprehending both arable and pasture land is, that the tenant shall enter to the houses and grass at Whitsunday, and to the arable land at the separation of the crop. If the landlord fail in putting the tenant duly in possession, he is liable in damages; which the tenant may deduct from the rent.

He is bound to deliver the subject in sufficient tenantable condition (*e*).

In a lease of lands, he is only bound (failing special agreement) to give possession such as may enable the tenant to reap the yearly fruits which spring up from the surface; not growing timber, coal, &c. (*f*).

(*a*) Macfarlane against Grieve, 22d May 1790.

(*b*) Erskine, ii. 6. 21.

(*c*) Whitsunday is, by 1693, c. 24 (declaratory of 1690, c. 30), fixed to 15th May in all civil respects. Martinmas is 11th November. By 24 Geo. II. c. 23, an error of eleven days, which had crept into the style or computation of time, is rectified by striking out those eleven days, and making an alteration on the leap years; and a general principle is laid down, that whatever ought to take place on a time depending on a fixed day of any month, shall take place on the same *nominal* day as formerly. There are some exceptions, that certain things shall take place on the same *natural* days as formerly, that is, eleven *nominal* days later. The only exception regarding leases is, that the same *natural* days shall be observed for payment of rent, entry, and removal, under leases entered into before 14th September 1752. In many parts of the country, however, Old Whitsunday, 26th May, and Old Martinmas, 22d November, are still observed in leases both of lands and of dwelling-houses, entered into since 1752. But it has been found (Stewart against Earl of Castille, 21st December 1811), that, even in those parts of the country, the new terms should be observed, in questions between buyer and seller, as to payment of price or interest. With regard to the addition of a twelfth day for old style, see *Fishing*, sect. Salmon, Note.

(*d*) See preceding note.

(*e*) Erskine, ii. 6. 39, 43.

(*f*) *Ibid.* 22.

He is understood to warrant his own right (*a*); so that, if the lease be evicted from defect of his right, he is liable in damages.

He is bound not materially to injure the tenant's enjoyment and use in possession, as by creating a nuisance, &c.; otherwise, he is liable in damages, if the evil consequences of the operation might have been foreseen. But a slight inconveniency, or disadvantage, is not to be regarded (*b*). If the subject have been totally destroyed, without the landlord's fault, as, the house falling, no rent is due (*c*). In such a case, the landlord is not bound to build a new house. Where the destruction has been partial, if very trifling, no deduction is made; if more considerable, some; in very strong cases, the lease may come to an end. Where a farm-house has been burnt, or otherwise materially injured, without blame on the tenant's part, the loss falls on the landlord, so that, if he wish the house rebuilt, he must be at the expence of doing it (*d*); but if he do not wish it rebuilt, he is not bound to be at that expence; leaving to the tenant to claim relief otherwise (*e*). The expence of executing repairs, rendered necessary upon a house by the unavoidable decay of time, without the tenant's fault, lies on the landlord. The tenant is liable for damage occasioned by his fault (*f*).

The landlord is liable in damages, if it be imputable to his fault that the tenant has not had full enjoyment of the subject (*g*).

There are sometimes other obligations by special contract.

## 2. *Obligations of tenant.*

The tenant must enter to possession at the stipulated or understood term, which is noticed in the preceding section. In the case of a rural subject, he must furnish the grass grounds with a sufficient stock of cattle, and cultivate and manure the corn lands (*h*). On his failure, the landlord may apply to the judge ordinary to compel him to find caution to enter, or to give up the lease. He is liable in damages. In urban tenements, such as a shop or an inn, the tenant is under the same obligation, which may be enforced in the same manner; as

(*a*) Erskine, ii. 6. 39.

(*b*) Ibid. 43.

(*c*) Ibid. 41.

(*d*) Swinton against M'Dougall, 16th January 1810.

(*e*) Walker against Bayne, 30th May 1811, as reversed on appeal, 3d July 1815; Dow's Reports, iii. 233.

(*f*) Hardie against Black, 3d March 1768.—M'Lellan against Kerr and Irvine, 5th July 1797.

(*g*) Erskine, ii. 6. 43.

(*h*) Ibid. 39.

the security for the rent is diminished, and the resort to the shop or the inn may be injured. And there seems not to be much less occasion for the same doctrine in the case of a dwelling house, in so far as the security for the rent may be impaired, or the house may suffer by standing long unoccupied.

The tenant must apply the subject to its proper use; the use which the parties had in view at contracting. He must use the subject with discretion and good management (*a*).

The tenant must restore the subject in good condition. In whatever condition he receives the farm houses, sub-division fences, &c. at his entry, he must leave them in the same condition at his removal (*b*): making allowance for the waste of time, and for any blameless accident, as a hurricane, lightning, or accidental fire. He must keep up the march fences, even though constructed during his lease (*c*). The tenant may retain from his rent sums debursed, which were necessary for upholding the subject; not those for mere ornament or greater conveniency (*d*); nor, in the ordinary case, those for substantial improvements, as he is held to reap the advantage during his lease. He cannot materially alter the form of the subject, as, in a house, by taking down partitions, &c.

The tenant must punctually pay the rent. The legal terms (failing special agreement) are Whitsunday and Martinmas of the year for the crop of which the rent is payable, though the crop be grass, with entry at Whitsunday. Certain cases in which no rent is due, or in which deduction is made from it, have been already noticed. Sometimes the obligation is suspended by the tenant retaining the rent in security of certain counter obligations, *e. g.* inclosing, &c. which the landlord has failed duly to perform. (See *Retention*.) The landlord has a *hypothec* in security of his rent. (See *Hypothec*.)

There are sometimes other obligations by special contract.

Sometimes, in order to quicken the tenant in the observance of the obligations in the lease, it is stipulated that he shall observe them, or pay an additional or penal rent, *e. g.* a certain number of pounds for every acre not managed as prescribed in the lease. This penal rent, being liquidated damages, is fully due, and cannot be modified to the real damage (*e*). It

(*a*) Erskine, ii. 6. 39.

(*b*) Ibid. 39.—Dudgeon against Howden, 23d November 1813.

(*c*) Dudgeon, *supra*.

(*d*) Erskine, ii. 6. 43.

(*e*) Pollock against Paton, 24th July 1777; Dict. iv. 327; Morrison, Tack, App. 7.—M'Kintosh against M'Donell, 1st February 1798.—Henderson against Maxwell, 24th February 1802.—Graham against Straiton, 1787, as reversed in the house of Lords 11th May 1789; noticed in Mac-

is due, though the deviation become expedient by circumstances not imputable to the tenant, unless the landlord consent; as where a tenant, bound not to take two white crops in succession, sows wheat along with grass, and the grass failing, sows barley and grass next year (*a*). Such a stipulation does not give to the tenant an option to infringe the obligations of the lease, on payment of the additional rent: he may be prevented by the judge ordinary (*b*).

### III. TRANSFERENCE BY TENANT.

#### 1. *Assigning.*

A lease can be assigned only where assignees are expressly allowed in it (*c*), unless it be a lease of more than ordinary endurance, as a liferent lease, or a lease of three nineteen years, or even perhaps of two nineteen years: but it may be adjudged by creditors, unless assignees be expressly excluded (*d*).

An assignee is bound directly to the proprietor to pay not only the rents falling due during his possession, but also those which fell due during the possession of the cedent. The cedent is still bound for the rents which fell due during his own possession (*e*). But, although some have thought that he is bound for the rents falling due after assignation (*f*), this has never been directly decided, and is considered as attended with difficulty (*g*), and is doubted by many.

#### 2. *Sub-setting.*

Sub-setting is excluded in leases of lands of ordinary endurance, unless expressly allowed. It has been found to be excluded in leases of 19 years (*h*); and even of 21 years (*i*); but not of 38 years (*j*). An urban tenement (a dwelling-house, shop, or the like) may be subset, though sub-setting be

Kenzie against Gilchrist, 13th December 1811.—The same found in the House of Peers as to a case from England; Rolfe against Petersons, 18th February 1772, Brown's Cases in Parliament, vol. vi. p. 470.

(*a*) Fraser against Ewart, 25th February 1813.

(*b*) Sir Alexander Muir M'Kenzie against Craigies, 18th June 1811.—M'Kenzie against Gilchrist, 13th December 1811.

(*c*) Erskine, ii. 6. 31.

(*d*) Ibid. 32.

(*e*) Ibid. 34.

(*f*) Grant against Lord Braco, 24th February 1743; Kilk. Tack, 2.—Bankton, ii. 9. 14.—Erskine, ii. 6. 34.

(*g*) Low against Knowles, 5th July 1796.—Erskine, *supra*, Note.—Bell on Leases, 2d edit. p. 349-351.

(*h*) Alison against Proudfoot and Litster, 22d January 1788.—Earl of Peterborough against Milne, 8th March 1791.

(*i*) Earl of Cassillis against M'Adam, 5th December 1806.

(*j*) Simpson against Gray and Webster, 22d May 1794.

not mentioned in the lease, provided it be not sub-let for a purpose different from its former use (a). Where the landlord has a right of challenge, he may lose it by acts inferring consent; as, by receiving the rent from the sub-tenant, &c.

A sub-tack requires the same solemnities as the principal tack (b).

The sub-tenant is directly bound to the principal tenant, not to the landlord. Where there is a power to sub-let, or where the sub-tenant has been approved of by the landlord, *bona fide* payment of the rent by him to the principal takaman is effectual to him against the landlord; otherwise he is liable for the years during which he has possessed, in second payment to the landlord, to the extent of the fruits with which he has intrusted, if the principal tenant have not paid. (See *Hypothesis*.)

#### IV. TERMINATION.

##### 1. *Before the term.*

A tack expires before the appointed time, 1. By the tenant running two years in arrear; or, 2. By his running one year in arrear, or deserting or leaving the subject unlaboured, and failing to find security for the rent of the next five years. The process for this, however, is not competent before justices (c).

It also expires by the mutual consent of parties, express or implied.

It also naturally expires by the landlord selling the subject, unless he specially reserve the tenant's right. But, by special statute, a tack of lands or of houses (d) is effectual against the purchaser, if it be in writing; if it specify the rent, which must not be elusory, and which goes all to the purchaser; if it specify the duration, which must not be excessive; and if possession have followed upon the title of the tack (e).

##### 2. *At the term.*

This is the natural termination. But to give effect to it, it is, in the ordinary case, necessary, either that the tenant renounce his possession to the landlord, or that the landlord warn the

(a) Anderson against Alexander and Miller, 10th July 1811.

(b) Erskine, ii. 6. 34.

(c) Act of Sederunt, 14th December 1766.—Erskine, ii. 6. 44.

(d) Waddell against Brown, 10th December 1794.—McArthur against Simpson, 6th July 1804.

(e) 1449, c. 18.—Erskine, ii. 6. 23-28.

tenant to remove ; otherwise the parties are understood to have entered into a new lease upon the same terms for another year, and so on from year to year ; which understanding is called *tacit relocation*. In grass parks, however, let from year to year, tacit relocation is not admitted. But it would be improper to enter into the particulars of warnings, and of removings which follow them, justices not being competent.

See *Location*.

## THEFT.

JUSTICES of the PEACE judge, by usage, in the different species of pickery, pilfering, or petty thieving, such as stealing fruit from gardens, and the like, as being a breach of the peace and quietness of society. By the general act 1661, c. 38, justices are directed to punish depredations on pigeon-houses, &c. with a pecuniary penalty, on conviction by oath of party ; for which, see *Pigeons*, &c. By a special statute, there is a summary jurisdiction vested in a single justice, for inflicting a small punishment on persons stealing or maliciously injuring certain vegetables ; for which, see *Turnips*, &c. Though justices cannot judge in the more heinous degrees of theft, they may take the necessary preliminary steps for bringing the offender to justice. See *Arrest*, &c. And they may have occasion to decide on application for bail by persons committed for such offences. See *Bail*.

### I. WHAT IT IS.

Theft is the felonious taking and carrying away of the property of another for profit (*a*).

#### 1. *Taking*.

It is the *taking*. In this respect it differs from the various kinds of fraud and swindling ; for in them the proprietor consents to the delivery of the article, though there have been fraud in inducing him to do so ; and from breach of trust ; for, in this latter case, the culprit is in possession, and with a power of management and disposal (*b*).

The following acts are not *theft* (though, no doubt, most or

(*a*) Hume, l. 54.

(*b*) Ibid. 54-2.

all of them are crimes of other denominations, and punishable accordingly); that an insolvent person represents himself as in good circumstances, and thus obtains credit for goods for which he cannot pay, and with which he runs off (*a*); or that a person who has got a subject in pledge, converts it to his own use (*b*); or that a person who has honestly borrowed or hired a subject, afterwards appropriates it (*c*); or that a factor runs off with the rent which he has been employed to uplift (*d*); or that a steward entrusted with the management of a farm, converts the price of the crop to his own use (*e*); or that a servant sells his livery clothes while in place, or goes off with them upon him when he leaves the place (*f*); or that a person who has found a parcel, and discovers whose it is, detains it (*g*).

It is theft though the thing be exposed to the risk of being stolen; for instance, if a shopkeeper put goods into the hands of one who asks for such articles to purchase, and this person immediately run off with them (*h*). Mr Burnett expresses doubts with regard to this instance (*i*); but these seem hardly well founded. It is theft if the custodier of a thing for a limited purpose appropriate it, for instance, a butler his master's plate, as the possession is held to be still in the master (*j*). This holds especially if such possession is temporary; for instance, a clerk or servant sent with an article to be delivered (*k*).

There is a difference of opinion, whether it be theft if a man hire or borrow a thing with the fraudulent purpose, at the time, of appropriating it. Baron Hume seems rather to think that it is (*l*). Mr Burnett (perhaps rightly) rather thinks not, on the ground that the owner gave the same consent to delivery, and to the same extent, as where the subject is hired or borrowed honestly, and the felonious purpose of appropriating is only taken up afterwards; and that it is merely a case of swindling (*m*).

## 2. *Carrying away.*

There must be a *carrying away*. The article must be brought into a situation in which it is less under the owner's command; otherwise, though there may be a punishable misdemeanour, there is not *theft*. In general, the thing must be

(*a*) Hume, i. 56.

(*b*) Ibid. 58.

(*c*) Ibid.

(*h*) Ibid. 62.

(*k*) Hume, i. 64.

(*e*) Ibid. 57.

(*f*) Ibid.

(*i*) Burnett, 112.

(*l*) Ibid. 67.

(*d*) Ibid. 59.

(*g*) Ibid. 61.

(*j*) Hume, i. 63.

(*m*) Burnett, 114.



removed from its state and place of keeping. If a boy put his hand into a man's pocket, and get hold of his purse, to steal it, but if he be stopped before taking it out, this seems not theft. But it is sufficient that the thing be carried away, though kept sight of, and immediately recovered. Although the removal be slight, it is sufficient, if the owner would be at a loss where to find the thing; as if a servant lift his master's purse from the table, though caught with it in the room, if his felonious purpose be evident. It is theft if the thing be taken from its proper place of keeping, as the cattle from an inclosure, though recovered in the next field of the same farm; or the money from a bureau, though recovered in the room; or the purse from the pocket. The alteration in the state of fixture, or peculiar keeping, with a very slight removal, is sufficient. Where no such peculiar provision is made, any removal which thoroughly alters the situation in which the thing happened to be, and is a step of conveyance from the owner's power, is sufficient; as if a loose article be carried from the higher floor of a house to a lower (*a*).

If the article have been carried away, the guilt is not removed by restoring it, or its value, to the private party wronged (*b*).

### 3. *Another's property.*

The thing must *belong to another*. A man cannot *steal* his own property, though lawfully in possession of another, as by hire or pledge; or even though at the time he believed it to be the property of another. It is not necessary to shew whose property the thing is; it is sufficient that it is not the property of the culprit, and that it was in a state of natural and lawful custody at the time, for behoof of the person having right (*c*). It is of no consequence that the proprietor is a corporation or the public (*d*).

Theft may be committed of any thing which can be carried away, though it be part of an immoveable subject; in which our law differs from that of England. If a man work coals in his neighbour's coal-pit, and carry them off, he is guilty of theft (*e*). It may be committed of all tame animals; and even of wild animals, if they be under the power of another; for instance, deer in a pen, rabbits in a house (*f*); and by statute, it is made theft to carry off deer from a park, fish from a pond, rabbits from a warren, pigeons from a pigeon-

(*a*) Hume, l. 69-72.

(*d*) Ibid. 77.

(*b*) Ibid. 77.

(*e*) Ibid. 78.

(*c*) Ibid. 76-77.

(*f*) Ibid. 80.

there does not seem to be any settled rule for punishing such a theft capitally on that ground alone (*a*).

(2.) *Aggravation from manner of Theft*.—The main aggravation of theft is its being committed by violence. The violence may be used either against the place of keeping, or against the person.

*Violence against the place of keeping*.—Under this term *violence* is included the picking of locks, &c.

Where the violence is used against a temporary booth or shed, or a chest, it is a high aggravation, and will often (though it may not in every case) render the crime capital (*b*).

Where it is committed against the house in which the article was kept, which constitutes *housebreaking*, it is capital, however small the value of the article stolen (*c*). A man has been sentenced to death for breaking into a house, and stealing a small quantity of butter (*d*). It is not necessary that any actual *breaking* or *forcing* open of the house have taken place; it is sufficient that its natural security have been overcome. The crime is housebreaking, for instance, if the lock have been picked by false keys (*e*); or if it have been opened by the true key stolen, (*f*) or which may have happened to be in the door at the time (*g*); or if the bolt by which the door is naturally secured have been any how thrust aside (*h*); or if the thief have opened the sash, and entered by the window, or have entered by the chimney, or by a sewer, for none of these are proper entries to a house, or require to be closed or barricaded any otherwise than by their natural state (*i*); or if he have privately, during the day, while the house was open, prepared the doors or windows for his entry at night (*j*); or if he have prevailed upon a servant of the house feloniously to admit him, for, in such a case, both he and the servant are art and part of the full crime of housebreaking; or if he have prevailed, by any pretence, on those within, to open the door, and have immediately rushed past them, and committed the theft (*k*). It is not necessary that the thief have entered with his whole body. It is sufficient that he have thrust in his hand, and snatched off something. Perhaps it is even sufficient, though no part of his body have entered, that he has merely thrust in a pole or hook, and carried off something (*l*). It seems hardly to be housebreaking, that the person has entered by an open window, at least if the window is near the

(*a*) Hume, 1. 108.

(*b*) Ibid. 98.

(*c*) Ibid.

(*d*) Ibid.

(*e*) Ibid.

(*f*) Ibid. 97.

(*g*) Burnett, 136.

(*h*) Hume, 1. 96.

(*i*) Ibid. 97.

(*j*) Ibid.

(*k*) Ibid. 98.

(*l*) Ibid. 99.

ground (*a*) (though Mr Burnett rather thinks it is (*b*)) ; or that he has either entered the house privately or openly on some plausible excuse, without housebreaking, but has been under the necessity, after committing the theft, in order to get out of the house, to overcome its natural security in any such way as those formerly mentioned (*c*) ; or that a person, being lawfully in a house, has broken into the room of another lodger (*d*).

A person may be art and part of housebreaking, though he personally have not entered ; for example, if he remain without to watch while his accomplices enter (*e*).

Every dwelling-house is protected by the capital sanction, however mean and fragile, and although uninhabited, or even not thoroughly prepared for habitation (*f*). And every edifice is protected by it, though not a dwelling-house, *e. g.* a counting-room, public office, sale room, store, or the like, if it be properly a house, or a shut and fast building, and not a mere open shed or temporary place of lumber (*g*).

It is implied in all that has been said that, to constitute the offence technically called *Housebreaking*, a theft must have been committed. Breaking into a house with intent to steal, but without actual theft, is punishable arbitrarily (*h*). (See *Crime in General*, sect. Wrongful act necessary.)

*Violence against the person.*—This constitutes *Robbery*, (formerly called *Stouthrief*) which is capital.

In this, as in other cases of theft, the crime is not committed unless something have been stolen. An assault, with an intent to rob, is a great crime, which may be followed by the highest arbitrary punishment ; but it cannot be punished as robbery (*i*). (See *Crime in general*.)

It is not necessary that the party injured have been beaten, or the article wrested from him by force ; it is sufficient that he have been constrained, by reasonable apprehension of instant personal danger, either to allow the article to be quietly taken from him, or even with his own hands to give it (*j*). Neither is it necessary that the article have been upon his person : it is sufficient that it was under his personal care and protection ; so that, without using violence, or exciting apprehension of violence, it could not have been taken (*k*). It seems necessary, however, that there have been an apprehension of instant personal violence (*l*). It seems hardly sufficient that a man, on

(*a*) Hume, l. 96.

(*b*) Burnett, 137.

(*e*) Hume, l. 99.

(*d*) Ibid.

(*e*) Ibid. 99.

(*f*) Ibid. 100.

(*g*) Ibid. 101.

(*h*) Ibid. 96, 100, Note.

(*i*) Ibid. 102.

(*j*) Ibid.

(*k*) Ibid. 104.

(*l*) Ibid.

receiving a letter threatening personal violence, sends the money demanded, or that he delivers his money on threats of having his house burnt, or of being accused of a capital crime, if he had no cause to apprehend personal danger. The apprehension of personal violence must exist at the time of delivery. It is not robbery if a man, on being attacked, promise to send money, and send it accordingly (*a*). It seems robbery, if a person be constrained to part with his goods on tender of full value (*b*). All the qualifications which have been stated to be necessary to constitute theft in general are necessary to constitute robbery; and, in particular, the thing must be taken feloniously for gain. It will not constitute robbery, for instance, that, in the course of a scuffle between two persons, one have run off with the other's cane or sword (*c*).

The place where the robbery has been committed, whether on the highway or elsewhere, and the value of the thing taken, do not affect the nature of the crime (*d*).

The same act may be both housebreaking and robbery; as, if a person, having entered a chamber by opening the window, should, by threats or violence, take from a person, in the chamber at the time, goods in his lawful possession (*e*).

(3.) *Aggravation from situation of thief*.—*Habite and repute*.—The prisoner's being habite and repute a common thief, i. e. one of that calling, and who makes or helps his livelihood by thieving, makes the theft capital (*f*). It is not sufficient that the accused be a doubtful or suspicious person: he must have been commonly held a thief (*g*). The best evidence is judicial proceedings; such as warrants to search the house of the accused or commitments for theft, or convictions of it; but it may equally be proved by the testimony, if positive and uniform, of credible and proper witnesses, who have cause of knowledge, and depone in general terms to the estimation of the accused (*h*).

*Repeated acts*.—It will make the offence capital if the accused have been guilty of two acts of not inconsiderable theft, such as mark him to be a practised thief, even though these are brought against him both at the same time (*i*). It appears, however, that, in very petty theft, such as stealing fruit from gardens, or picking the handkerchief from the pocket, three acts, and successive convictions (if even that would be sufficient) are indispensable to make the crime capital (*j*).

(*a*) Hume, l. 105.

(*b*) Burnett, 152.

(*c*) Hume, l. 104.

(*d*) Ibid.

(*e*) Ibid.

(*f*) Ibid. 90.

(*g*) Ibid. 92.

(*h*) Ibid.

(*i*) Ibid. 93-4.

(*j*) Ibid. 94-5.

*Other aggravations.*—The guilt is of course greater if the person guilty be a domestic servant of the owner, or in a situation of trust with him, or in a superior station in life. But although, in a certain degree, regard will be had to such circumstances, as well as to several others which may easily be imagined, yet not in such a manner as entitles them to be classed as known capital aggravations (*a*). At one period, in order to repress the lawless habits of many persons of rank and landed estate, who not only themselves plundered, but entertained bands of lawless followers for that purpose, “common” theft, reset of theft, and stouthreiff,” by landed men, were raised to the rank and pains of treason (*b*). But upon occasion of the Union between Scotland and England, it was enacted that those offences only which were treason in England should be so in Scotland (*c*); and it was in particular enacted, that “theft in landed men,” and certain other offences of different kinds (all of an aggravated nature, and which were previously capital, viz. murder under trust, wilful fire-raising, firing coal-heughs, and assassination) which had been declared to be treason by particular statutes in Scotland, should only be adjudged to be capital offences (*d*). So that this sort of theft seems now to be reduced to the ordinary rank, as it appears to be considered that the term “common” theft, used in the ancient act, to which of course the act passed on the Union refers, relates only to repeated and habitual theft; and that the object of the later act was merely to replace that offence (along with the others) in the situation in which it stood, as a capital offence, before the former act was passed; and that simple and ordinary theft by landed men was therefore not affected by the former act, nor consequently by the later act relating to the former, and retains its ordinary rank at common law (*e*).

#### 4. RESET OF THEFT.

Reset of theft is the receiving and keeping of stolen goods, knowing them to be such, and with the felonious intention of concealing and withholding them from the owner (*f*).

To constitute this crime, the resetter must have taken the goods into his own possession; he must have become privy to the hiding them about the house, or the like (*g*): it is not sufficient to constitute *this* crime (though punishable otherwise) that the accused have harboured the thief in his house

(*a*) Hume, l. 96.

(*b*) 1587, c. 50.

(*c*) 7 Anne, c. 21, sect. 1.

(*d*) Ibid. sect. 7.

(*e*) See Hume, l. 95.—See Burnett, 125.

(*f*) Hume, l. 110.

(*g*) Ibid.

while that person had the goods in his possession, even though he knew that that person had them (*a*). It is not necessary that he have received them directly from the thief: it is sufficient that he have received them from any person, knowing them to be stolen (*b*). But he must *know* them to have been stolen. Bare suspicion of that fact, or that the possessor had reasonable cause to doubt whether his author acquired the things lawfully, is not enough; for he may only have been deficient in sagacity or attention (*c*). There can seldom, of course, be direct proof of his knowledge: it must be judged of from the whole circumstances of real evidence in the case: such as the concealment of the goods in hidden places—the denial of them to the officers of justice upon their search—the attempt to disguise them by alteration or effacing of marks—the low price paid for them—the inconsistent accounts given of the manner of getting them—and the quality of the goods themselves being such, as those from whom they were got could not honestly have obtained: of all which it is a powerful confirmation, if the accused himself, or his author, is of evil fame, is a resetter or thief (*d*). The receiving must be with the felonious intent of keeping the goods from the owner. A man may receive stolen goods, knowing them to be such, in order to restore them to the owner, and detect the thief; (and, therefore, the libel or complaint ought to express that the accused did “wickedly and feloniously reset and receive,” &c.) but the presumption is against the receiver of stolen goods (*e*).

This crime is often akin to theft, and may resolve into it, if the reset have taken place very soon after the commission of the theft (*f*). The offender is art and part of the theft, if he was in the previous knowledge of the intention to commit it, and gave any sort of previous assistance, and received the goods immediately on their being stolen (*g*). A person in possession of stolen goods, with corroborative circumstances, such as those before mentioned, in considering the effect of possession, will be held the thief rather than the resetter; and it will lie with him to overcome this presumption by a stronger presumption to the contrary (*h*).

It appears that the punishment of proper reset of theft, even though repeated, is not capital (*i*). It appears, too, that in the ordinary case the resetter cannot be punished more severely than the thief. The case may be different where the thief is

(*a*) Hume, i. 110.

(*d*) Ibid. 112.

(*h*) Ibid. 114-5.

(*b*) Ibid. 111.

(*e*) Ibid.

(*f*) Ibid. 113.

(*i*) Ibid. 115-6.

(*c*) Ibid. 111-2.  
(*g*) Ibid.

a minor, or has some other plea of alleviation. The thief may often be more severely punished than the resetter, even where his punishment is not capital; as many aggravations may apply to the thief, which do not extend to the resetter; for instance, the thief being habite and repute, his having been formerly convicted of theft, his having committed the theft by violence, or the like. The reset must therefore be judged of by its own qualities (a).

It is competent to lay the libel with an alternative charge of theft and reset, or one or other of them, as shall appear upon the trial. And the resetter may be tried before the thief, although the latter be known and in custody; and the thief may even be used as a witness against the resetter (b).

Justices of peace are competent to try minor instances of reset of theft. They ought to prepare more aggravated instances for trial by a court of more extensive powers. See *Arrest*, &c.

#### V. THEFT-BUTE.

Theft-bute is committed by compounding with a thief to save him from prosecution (c): which is done by any corrupt compact with the thief, whereby the person who has him in his power barter the public justice for profit and lucre to himself; as, by taking a ransom from the thief to dismiss him; or receiving a share of what he has stolen to protect him (d). A person merely taking back his stolen goods, or their value, and letting the thief go, though he has not discharged the duty he owed to society, seems not guilty of this crime (e), unless he engage not to prosecute or expose the thief (f).

Ancient statutes, making this crime capital in certain cases, seem to have fallen into desuetude. But the crime is still punishable (g). Perhaps justices, in the inferior cases proper to be tried by them, would impose a fine or a short imprisonment.

*Giving* theft-bute is not punishable; but is a circumstance of suspicion of theft (h).

For the sale of stolen goods, see *Sale*, sect. What may be Sold. For pawning such, see as above, and *Pledge*, sect. By Statute.

See *Process*, sect. Criminal.—*Proof*, sect. Criminal.—*Search Warrant*.—*Planting*.—*Manufactures*.—*Piracy*.—*Pigeons*, &c. *Turnips*, &c.—*Crime in General*.

(a) Hume, l. 115-8.

(d) Ibid.

(g) Hume, l. 406.

(b) Ibid. 117-8.

(e) Ibid.

(h) Ibid. 407.

(c) Ibid. 406.

(f) Burnett, 162.

## THREATS.

THREATS may be either *written* or *verbal*.

*Written*.—The denunciation of fire-raising, or other atrocious mischief, in writing, or incendiary letter (as it is often called) addressed and conveyed to the person who is the object of the threats, is a high crime, whether the writing be signed with the real name of the writer, or be anonymous, or be signed with a fictitious name. The punishment is arbitrary. Persons convicted have been transported for life (a).

Justices of the peace, of course, should not, in the ordinary case, try for written threatening, as they cannot, in the ordinary case, inflict an adequate punishment. But they may take steps preparatory to trial. (See *Arrest*, &c.)

*Verbal*.—Even the verbal threatening of personal mischief, if violent and pointed, is relevant as a reasonable ground of alarm, both to the individual and to the public, for obliging the offender, upon complaint, proof, and conviction, to find caution to keep the complainer free of harm, under such penalties as the court think fit (b).

See *Surety of the Peace*.—*Surety for the Good Behaviour*.—*Lawbreakers*.—*Breach of the Peace*.

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 TOKENS.

SPECIAL provision has been made, to be executed by justices, for preventing the use of other tokens than those of the Banks of England or of Ireland.

Tokens wholly or partly of gold or silver are not to be made or originally issued after 29th July 1812; penalty from L.5 to L.20 (c). They are not to be circulated (except presenting to the original issuers, who are liable in payment (d)) after six weeks from commencement of session 55 Geo. III.; penalty from L.5 to L.10 (e). One justice of the place of the offence to judge of it; and, on information on oath, to summon party and witnesses; and to convict on confession or oath of one witness (f). Witness not attending, to forfeit L.20, to be

(a) Hume, i. 434-7.

(c) 52 Geo. III. c. 157, sect. 1.

(e) Sect. 1, 2.

(b) Ibid. 437.

(d) 54 Geo. III. c. 4, sect. 2, 3.

(f) 52 Geo. III. c. 157, sect. 4.



levied, &c. as under (a). Conviction to be returned to quarter sessions (b). Clerk of the peace to give copies of convictions, at 1s. each, to any applicant (c). Half of penalty to informer, half to poor of place of offence: to be levied, with costs and charges, by distress (d). Justice may detain person convicted till return may reasonably be made to distress, unless he find caution to appear at such reasonable interval, not exceeding five days from date of security (e). Person convicted may be committed for three calendar months, for want of distress, unless sooner paid, or till he give notice of his intention to appeal to next quarter sessions, and enter into recognizance with two sureties to prosecute the appeal, and abide the judgment; notice to be not less than eight days before trial; the decision of the quarter sessions final (f). Parishioners may be witnesses (g). Proceedings not to be quashed for want of form; or to be removed by any writ into any court of record (h). Actions against persons executing the act to be brought within three calendar months after the fact, within the county of the fact; and the defender, if assailable, to have treble costs (i). Those provisions not to extend to tokens issued by the Banks of England or of Ireland (j).

## TRANSACTION.

TRANSACTION, or compromise, is a private arrangement between parties of a matter in controversy; by which each party usually passes from part of what he conceives to be his right, in order to avoid litigation. The effect of transaction is completely to prevent all process at law with regard to any of the questions transacted, however disadvantageous the bargain may afterwards be discovered to be, and even though one of the parties should be afterwards ascertained to have no right. This, like every other lawful agreement, has the support of a court of law to enforce the obligations on either side. Justices seem competent to such actions under the small debt act.

See *Submission*.

(a) 52 Geo. III. c. 157, sect. 5.

(d) Sect. 8.

(h) Sect. 12.

(e) Sect. 9.

(i) Sect. 13.

(b) Sect. 6.

(f) Sect. 10.

(j) Sect. 3.

(c) Sect. 7.

(g) Sect. 11.

## TREASON, &amp;c.

## I. TREASON.

**HIGH TREASON** includes all offences more immediately directed against the government of the King, and violating the allegiance due to him (*a*). The English law on this subject was substituted for the Scots at the Union (*b*). A very slight sketch of it is sufficient.

The following acts are treason :

Compassing the death of the King, of the Queen, or of their eldest son (*c*) ; which must be shewn either by an overt act directly tending to the death of the King, or by an act tending to bring his life into some hazard, as to fortify a house to resist his power, to take measures for constraining his acts, &c. Direct attempts against the life of the Queen or the Prince are necessary (*d*).

Violating the Queen, the King's eldest daughter unmarried, or the wife of the King's eldest son (*e*).

Levying war against the King within the realm (*f*) ; as by assembling an armed force against his power, or by a multitude, though not in warlike array, proceeding to execute some enterprise of public concern, as to open all jails ; not an enterprise of private concern, as to rescue a certain criminal (*g*).

Adhering to the King's enemies within the realm, giving to them aid or comfort (*h*) ; as giving them information, or the like (*i*).

Counterfeiting the great or privy seal (*j*), or the seals appointed by the articles of Union to be kept in Scotland (*k*) ; or forging the sign-manual, privy signet, or privy seal (*l*).

Counterfeiting the King's money, or knowingly bringing false money into the kingdom like the King's money, to use it (*m*). Copper money is not included (*n*). Counterfeiting foreign gold or silver coin current by consent of the crown (*o*) ; or importing such, to use it (*p*) ; or washing, clipping, rounding, or filing (*q*), impairing, diminishing, falsifying, scaling, or lightening the coin of this kingdom, or that of other king-

(*a*) Hume, l. 506.

(*b*) 7 Anne, c. 21.

(*d*) Hume, l. 507-514.

(*g*) Hume, l. 514-9.

(*i*) Hume, l. 519.

(*k*) 7 Anne, c. 21, sect. 9.

(*m*) 25 Edward III. c. 2.

(*o*) 1 Mary, st. 2, c. 6.

(*q*) 5 Elizabeth, c. 11.

(*c*) 25 Edward III. c. 2.

(*e*) 25 Edward III. c. 2.

(*f*) Ibid.

(*h*) 25 Edward III. c. 2.

(*j*) 25 Edward III. c. 2.

(*l*) 1 Mary st. 2, c. 6.

(*n*) Hume, l. 525, 565.

(*p*) 1 and 2 Philip and Mary, c. 11.

doms current by proclamation (*a*); or knowingly making or mending, buying or selling, or possessing, instruments proper only for coinage, or conveying such instruments out of the mint, or marking coin on the edges, as is done in the mint, or colouring, gilding, or casing over any coin resembling the current coin, or even round blanks of base metal (*b*); or colouring or altering a shilling or sixpence to make them resemble a guinea or half guinea, or a half penny or a farthing to make them resemble a shilling or a sixpence (*c*). Those treasonable offences against the coin seem now only competent to be tried as appointed for treason, not at common law (*d*). For offences not treasonable, see *Coin*.

Killing the Chancellor, Treasurer, or certain Judges in England (*e*); or any of the Lords of Session or Justiciary in Scotland, sitting in judgment (*f*).

Maintaining advisedly, by writing or printing, that any person has right to the crown otherwise than according to the act of settlement; or that the King and Parliament cannot regulate the succession (*g*).

Any person, within the kingdom or without it, compassing or intending death or destruction, bodily harm tending to such, maiming or wounding, imprisonment or restraint, of the King; or to deprive him of the style or honour of King of any of his dominions; or to levy war against him, within this kingdom, in order, by force or constraint, to compel him to change his measures or counsels; or in order to constrain or intimidate either House of Parliament; or to move any foreigner to invade, with force, any of the King's dominions; and expressing such compassings or intentions, by publishing any printing or writing, or by any overt act (*h*).

A popish priest, born in the King's dominions, coming from beyond sea, or remaining here three days without conforming to the church (*i*); or any person being twice convicted of advisedly maintaining the pope's jurisdiction in this kingdom (*j*); or any person using any bull, absolution, or reconciliation from the see of Rome (*k*); or any natural born subject withdrawing from his allegiance, and being reconciled to the see of Rome, or to any other prince or state, or any person bringing this about, or, it appears, even attempting it (*l*).

- (*a*) 18 Elizabeth, c. 1. (*b*) 8 and 9 William III. c. 26.—7 Anne, c. 25.  
 (*c*) 15 and 16 Geo. II. c. 28.—Hume, i. 525.  
 (*d*) Hume, i. 525. (*e*) 25 Edward III. c. 2.  
 (*f*) 7 Anne, c. 21, sect. 8. (*g*) 6 Anne, c. 7.  
 (*h*) 36 Geo. III. c. 7.—57 Geo. III. c. 6, sect. 1.  
 (*i*) 27 Elizabeth, c. 2. (*j*) 5 Elizabeth, c. 1.  
 (*k*) 13 Elizabeth, c. 2, sect. 2, 3. (*l*) 2 James I. c. 4.—Hume, i. 524.

Natural born subjects owe allegiance to this state all their lives. Aliens, while residing here at peace (*a*).

The punishment of treason is, drawing on a hurdle, hanging still dead (which the King may dispense with) beheading, and quartering (*b*), forfeiture of moveables, honours, and estate, for ever, and corruption of blood (*c*).

Certain peculiarities in the form of the trial for treason do not concern justices; as they of course cannot try for it. But they may take the steps preparatory to trial (see *Arrest*, &c.); though it is presumed they would be disposed, after arresting the criminal, and securing perishable evidence, to devolve the precognition upon the sheriff.

Indictment for treason must be found by a grand jury. And, except in the case of attempts against the life of the King by assassination or otherwise, must be found within three years after the offence (*d*).

## II. MISPRISION OF TREASON.

Misprision of treason is the being in the knowledge of an act of treason, and failing to reveal it to some judge of assize or justice of the peace; so that when a new treason is created, a corresponding misprision arises (*e*). Forgers of foreign gold or silver coin, not current in the kingdom, are punishable as for misprision of treason (*f*).

The punishment is perpetual imprisonment, forfeiture of moveables, and of the profits of lands for the offender's life (*g*).

Justices of the peace of course cannot try for this crime. Their duty in taking steps preparatory to trial is the same as in treason.

## III. UNLAWFUL TRAINING TO ARMS, &c.

Certain provisions with regard to the unlawful training to arms, &c. may be noticed here, that offence being preparatory and subservient to *Treason*.

Every person who is present at any meeting for training or drilling to the use of arms, or for practising military exercise, which is assembled without authority from the King, or the lieutenant, or two justices of the county, and who trains or drills, or assists, or is present for such purposes, may be transported for seven years, or may be imprisoned not exceeding two years; and every person who is trained or drill-

(*a*) Hume, l. 526-8.

(*b*) 54 Geo. III. c. 146.

(*c*) Hume, l. 537-543.—39 Geo. III. c. 93.—54 Geo. III. c. 144.

(*d*) 7 William III. c. 2.

(*e*) Hume, l. 543.

(*f*) 14 Elizabeth, c. 3.

(*g*) Hume, l. 543.

ed, or, is present for such purposes, may be fined and imprisoned not exceeding two years (a). Justices of the peace seem not competent to the trial of such an offence.

Justices, and all other inferior judges and magistrates, constables, and other peace officers, may disperse such meetings, and may apprehend those concerned, and deal with them as in cases of bailable offences (b). (See *Arrest, &c.—Commitment.—Bail.*)

Offenders may be indicted for any offence punishable independently of this act, if not prosecuted under this act (c).

Prosecutions under this act must be brought within six months after the offence (d). And actions against justices, &c. for things done by them in pursuance of this act are limited to six months, with treble costs, &c. (e).

## TURNIPS, &c. STEALING, &c.

A SUMMARY jurisdiction is vested, by statute, in a single justice of the peace, to punish for stealing or injuring certain vegetables much exposed to petty depredations.

If any person steal, take away, or wilfully or maliciously pull up, injure, or destroy, any turnips, potatoes, cabbages, parsnips, beans, pease, or carrots, in any garden, orchard, or grounds, open or inclosed, and be convicted before any justice of the peace for the county where the offence is committed, by confession or by the oath of one credible witness, he forfeits not exceeding twenty shillings, over and above the value of the goods stolen, &c. which sum is to be distributed between the owner of the turnips, &c. and the persons having charge of the poor of the parish where the offence is committed, in such proportion as the justice thinks fit: or the whole may be given to the owner of the turnips, &c. or to the overseers of the poor, according to the discretion of the justice; and in default of payment, the justice is to commit the offender to the house of correction to hard labour (or, it appears, to prison, where there is not a house of correction) not exceeding two calendar months, unless the penalty be sooner paid; and the offender may be brought before the justice, and the proceedings may be carried on in the most summary manner (f). The evi-

(a) 60 Geo. III. c. 1, sect. 1.

(b) Sect. 2, 2.

(c) Sect. 4.

(d) Sect. 7.

(e) Sect. 6.

(f) 13 Geo. III. c. 32, sect. 1.

42 Geo. III. c. 67.

dence of the owner of the turnips, &c. and of the inhabitants of the place where the offence is committed, is allowed (a). But where the conviction is upon the oath of the owner, the whole penalty goes to the poor (b). Prosecutions must be commenced within thirty days after the offence (c).

This act does not prevent prosecutions at common law, for such offences, before the justices, for higher penalties, if, from the aggravated circumstances of the case, that be thought a more proper course.

See *Theft.—Mischief, Malicious,—Process.—Proof.—Punishment.*

## USURY.

THE act of Queen Anne (d) now chiefly regulates this matter.

One of its provisions renders void all bonds, contracts, &c. "whereupon or whereby" there is stipulated, for the loan or use of money, more than 5 per cent. per annum. But, by special statute, a bill or promissory-note granted for an usurious cause is declared effectual to an onerous indorsee, unless, when he received it, he had actual notice of the consideration for which it was granted (e). This nullity may perhaps sometimes occur as a defence in prosecutions before the justices under the small debt act.

The other provision of the act enacts a forfeiture of treble the sum lent, half to the king, half to any person who prosecutes, for taking more than 5 per cent. per annum. The debtor has also his acquittance of the debt, under the first provision, if the usury was stipulated in the instrument; otherwise not (f). Prosecutions for the treble penalties must be brought within a year after the offence, if by a private party, and within two years after that year, if by the precurator-fiscal for the crown (g). This being purely a pecuniary action, and, therefore, competent before any judge ordinary, and without a

(a) 13 Geo. III. c. 32, sect. 2.

(b) Ibid. sect. 3.

(c) Ibid. sect. 5.

(d) 12 Anne, c. 16.

(e) 58 Geo. III. c. 33.

(f) Hume, l. 494.

(g) 31 Elizabeth, c. 5.—Walker and others against Allan, 30th June 1807, affirmed on appeal.—Morison against Connel, 24th June 1808.—Meal against Thom, 27th November 1810.

jury (*a*), is probably competent before justices under the small debt act. But it is very improbable that such an action should occur before them.

For the distinctions and details in this matter, Baron Hume's work (*b*) and the other authorities (*c*) may be consulted.

For pawnbrokers' interest, see *Pledge*, sect. Redeeming Pawns, &c.

## VAGABONDS.

JUSTICES OF THE PEACE are directed to execute the acts "against wilful beggars and vagabonds, solitary and idle men and women, without calling or trade, lurking in ale-houses, tied to no certain services, repute and holden as vagabonds; and against those persons who are commonly called Egyptians" (*d*).

Under the denomination vagabonds are comprehended all sorners, or persons who masterfully take meat and drink without payment; all idle persons who go about using subtle, crafty, and unlawful play, as jugglery, fast and loose, and the like; the people calling themselves Egyptians (gypsies) or any other who pretend to foresee future events, and to tell fortunes, or to have skill in magic, or the like; pretended idiots; able bodied persons, alleging that they have been burnt out in some distant part of the country, or that they have been banished from some other place for crimes; others having no land nor masters, nor following any lawful trade or occupation, and who can give no good account of themselves how they earn their living; all tale tellers and ballad singers, not properly licensed (*i. e.* not being in the service of the Lords of Parliament, or of the great burghs); all sailors alleging that they have been shipwrecked, unless they have sufficient testimonials of the truth of their story (*e*). The Egyptians were a race of disorderly persons who came from the East and overspread Europe some centuries ago. They were of the worst character; and, being joined by all the idle and dissolute in the countries in which they settled, were an intolerable grievance.

(*a*) Wilson against Jackson, 19th January 1778.

(*b*) Hume, i. 492-502.

(*c*) Plowden, Ord, &c.

(*d*) 1561, c. 38.

(*e*) 1449, c. 22—1457, c. 79—1579, c. 74—1592, c. 149—1698, c. 21.—Of these, 1679, c. 74, seems to be the leading regulation.

Poor persons who beg, even in their own parishes, are to be punished as vagabonds (a); as provision is made for supporting them without begging, if they cannot find work, or are unfit for it. (See *Poor* (b)).

For the multifarious description of delinquents above enumerated, a great variety of corrections have at different times been appointed; such as banishment, loss of the ears, &c. and some even more severe; vagrancy, particularly sorning, having at one time been a very great grievance. The Egyptians were banished successively from the different countries of Europe; from Scotland, under pain of death. But rigorous punishments have not for a long time been applied to vagrancy, except when an act of sorning occurs (which rarely happens) such as it seems proper to deal with as an act of theft or of robbery. The severe part of the enactments against Egyptians, in particular, is now in desuetude (c); though they are still liable to be dealt with as vagabonds. The punishment usually inflicted by justices (and, it is believed, few other judges, though of more extensive powers, go farther in this matter) is a short imprisonment; and sometimes they also lay under surety for the good behaviour. Beggars are directed to be imprisoned, and fed on bread and water, for a month (d).

The pretending to exercise any sort of witchcraft, sorcery, enchantment, or conjuration, undertaking to tell fortunes, or pretending, from skill in any occult or crafty science, to discover where or how goods stolen or lost may be found, is, by a later statute, made punishable, on conviction upon indictment or libel, for each offence with imprisonment for a year, and, if the court think fit, the person offending may also be obliged to give sureties for his good behaviour, in such sum and for such time as the court think proper, and is to be farther imprisoned till such sureties be given (e). Justices of the peace appear to be

(a) 1579, c. 74.—1661, c. 38.—Proclam. 11th August 1692.—Proclam. 29th August 1693.—Ratified by acts 1695, c. 43; 1698, c. 21.

(b) The lucrative trade of begging, which is the source of many evils, can be sufficiently checked by the existing laws, if they be not obstructed by indiscriminate charity; particularly when they are aided, as recently in Edinburgh, Perth, and elsewhere, by some provision for putting those who beg from necessity upon a course for obtaining relief.

(c) Hume, i. 467-471.

(d) Proclam. 29th August 1693.

(e) 9 Geo. II. c. 5.—This act also prescribes pillory; but, by a later statute, that punishment is now abolished except in cases of perjury (see *Punishment*, sect. Pillory). This act prohibits all prosecutions for the supposed crime of witchcraft; for which many suffered death in former times, chiefly about the year 1661 (Hume, i. 580); one in Sutherlandshire by burning, which was the usual mode, so lately as 1722, (Arnott's Criminal Trials, p. 360-7).



competent to take trial of offences against this statute ; but it appears to be in general more expedient that such cases should be disposed of by the sheriff.

Harbouring the kind of persons above described as vagabonds, the earning a livelihood by keeping a known and peculiar house of haunt or harbourage for them, was made the subject of some severe enactments in former times ; and, independently of those, is punishable at common law (*a*). Justices of the peace are directed "to punish and fine their re-setters and setters of houses to them accordingly, by such competent pains as is proper for them to enjoin" (*b*). The most common course is said to be to inflict imprisonment or a fine, and to lay under surety for good behaviour.

By an old act, vagrants and sturdy beggars might be compelled into service by any manufacturer within the kingdom, at the sight of the magistrates of the place, where they were laid hold on (*c*) ; but few manufacturers were willing to take such person into their service ; and this provision has long been in disuse (*d*).

#### FORMS OF PROCEEDING.

##### 1. *Commitment for further examination.*

[Place and date.] "C D," [design or describe him] "having been brought before me, G H, Esq. of one of his Majesty's justices of the peace for the county of M., charged with conducting himself as a vagabond at upon the day of " [state the leading particulars of the act of vagrancy charged] "and the said C D having been examined by me, I hereby grant warrant to constables to apprehend and commit him to the tolbooth of , the keepers whereof are hereby ordered to receive and detain him for farther examination." (See *Arrest, &c.*)

[Sometimes, after the accused has been detained for a few days on such a warrant, this is thought sufficient, farther procedure is dropped, and he is liberated. When farther procedure, upon a regular complaint, is thought proper, the accused may be committed for trial (see *Commitment for trial*) ; and the complaint may be in the following terms] :—

(*a*) Hume, i. 474-5.

(*b*) 1661, c. 38.

(*c*) 1663, c. 16.

(*d*) Erskine, i. 7. 61.—*Note.* Various acts of parliament have from time to time been passed with regard to vagrants and rogues and vagabonds, in England ; but they seem not to extend to Scotland.

2. *Complaint.*

“ Unto the Honourable his Majesty’s justices of the peace  
 “ for the county of M,

“ The petition of A B, procurator-fiscal of court, for the  
 “ public interest,

“ Humbly sheweth,

“ That C D” [design or describe him] “ was apprehended  
 “ conducting himself as a vagabond at <sup>upon the</sup>  
 “ day of by.” [state any particulars of the  
 offence which may be material, or as the case may be. See  
*Process*, sect. Complaint.]

“ May it therefore please your Honours to punish the said  
 “ C D with imprisonment, and to lay him under surer  
 “ for his good behaviour, or to do otherwise as may seem  
 “ proper.”

“ A B, P. F.”

[Deliverance is granted for serving a copy of the complaint  
 and of this deliverance, upon the accused, and for citing him  
 to appear for trial at a short interval, *e. g.* six days, and for  
 citing witnesses.]

3. *Judgment.*

[Place and date.] “ The justices having considered this  
 “ complaint, and proof adduced, find the said C D guilty of  
 “ the offence charged, and grant warrant to constables for  
 “ committing him to the tolbooth of N, the keepers whereof  
 “ are hereby ordered to detain him for four weeks from this  
 “ date” [or as the case may be.]

“ G H, J. P.”

“ J K, J. P.”

[See farther in *Process*, sect. Forms of Proceeding.]

See *Poor*.—*Gaming*.

## VOLUNTEERS.

It is hardly necessary to notice volunteers.

The leading statute at present is 44 Geo. III. c. 54; which has not been materially altered by subsequent acts. A justice may punish for selling arms, &c. and for buying such. If subscriptions or fines be not paid, he may levy double the amount by distress. He may punish for refusing to deliver up arms. For the details of those and other matters, the subsisting statutes must be consulted.

## WRECKS.

THE sheriffs, justices of counties, bailiffs, and head officers of towns near the sea, constables, and customhouse officers, on application by or for the commander of a ship stranded, or in danger, must command the constables of the neighbouring ports to call necessary men as assistants, and to call the assistance of the commanding officers of any king's ship, or merchant ship, at the place, by their boats, and such hands as they can spare; which commanding officers, for neglect, forfeit L.100 to the superior officer of the ship in distress, in any court of record (a). The collectors of customs, and all others employed in saving a ship or cargo, must, within thirty days, be reasonably paid by the commander or merchant; otherwise, the ship or goods are to be detained by the officer of customs till the charges be paid, and recompense made, or secured to the satisfaction of parties. In case of difference between the custom-house officer and the captain or merchant, as to the recompense to any person, they appoint three neighbouring justices, who ascertain the amount. If no person claim the goods saved, the chief customhouse officer of the nearest port applies to three of the nearest justices, who put him, or some other responsible person, in possession of the goods, they taking an account of the goods signed by that officer; and if not claimed within twelve months, the goods are publicly sold, (and, if perishable, forthwith sold), and the proceeds, after

(a) 12 Anne, sess. 2, c. 18, sect. 1, made perpetual by 4 Geo. I. c. 12; found to extend to Scotland; Commissioners of Customs against Lord Dundas, 25th May 1810.

deducting charges, are, with an account of the whole, transmitted to Exchequer for behoof of the owners (*a*). If any person besides those employed by the officers of customs, or the constables, endeavour to enter the ship in distress, without their leave, or that of the commander, or molest or interrupt them, or deface the marks on the goods, before they are taken down in a book by the commander and first officer of the customs, such person must make double satisfaction within two days, at the discretion of the two nearest justices; or, in default, is by such justices to be sent to the next house of correction, to hard labour for twelve months (*b*); and any commander or superior officer of the ship in distress, or the customhouse officer or constables on board, may repel by force persons so improperly pressing on board, and molesting them (*c*). If goods stolen from such ship in distress be found on any person, he must restore them on demand, otherwise he forfeits treble value, to be recovered by the owner in an action (*d*). Persons wilfully doing any thing tending to the immediate loss of such ship in distress, as making a hole, stealing a pump, &c. are guilty of a capital crime (*e*).

By the preceding provision, the custody of *stranded* vessels and goods, if the master or others directly interested do not claim it, is given to the customhouse officers. The vice-admiral of the bounds, by commission from the king, has the right of custody (and afterwards the property, if not claimed by the owners) of *wreck* properly so called, that is, goods of which the owners cannot be traced by any person having escaped alive, or by marks; and which term comprehends not only *wreck* so called in a more limited sense (goods thrown on shore), but also *jetsom* (goods cast into the sea and sunk), *flotsom* (goods floating on the surface of the sea), and *lagan* or *ligan* (goods cast into the sea, and sunk, with a buoy or cork attached to them by a line): but the admiral must make up a list of such goods at the sight of the officers of customs and excise (*f*).

The plundering of wrecked vessels may have the highest arbitrary punishment (*g*). If any of the crew survive, and

(*a*) 12 Anne, sess. 2, c. 18, sect. 2.

(*b*) In Scotland, where there are very few correction houses, it appears that the offender may be committed to gaol.

(*c*) 12 Anne, sess. 2, c. 18, sect. 3.

(*d*) Sect. 4.

(*e*) Sect. 5.—*Note*, 26 Geo. II. c. 19, is declared, by its 16th section, not to extend to Scotland.

(*f*) Commissioners of Customs and Excise and others against Lord Dundas, 2d December 1812; and authorities there cited.

(*g*) Hume, i. 481.

continue their use of the vessel and cargo, the plundering from it, when anywise under their protection, seems capital, as being robbery (a). The plundering of wrecked vessels, being a maritime offence, ought to be tried, in the first instance, before the Court of Admiralty (b). Justices of the peace may prepare for trial. (See *Arrest, &c.*) They may perhaps punish for smaller depredations on goods thrown on shore. And it is their duty to prevent depredations on wrecked goods as far as in their power, and to preserve the goods for those having right to the custody of them, as above specified.

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### WRONGOUS IMPRISONMENT.

THERE is a special statute, 1701, c. 6, commonly called the Liberation Act, against wrongous imprisonment; certain cases provided for under which are noticed in other articles. (See *Commitment for Trial.—Bail.—Liberation.*)

That act farther forbids all close imprisonment of any person beyond eight days from the time of commitment, under the penalties of wrongous imprisonment mentioned under *Commitment for Trial*. By close imprisonment is meant solitary and inaccessible imprisonment, where access is denied to friends or agents (c).

It also forbids, under the same penalties, all confinements not either consented to by the party, or inflicted after trial, by sentence. It is thought that this provision relates to a wrong which is not an incarceration in a known jail, but an irregular confinement in some private strong-hold; and that it relates only to acts of power and authority by a magistrate under colour of his office; similar lawless violence by private persons being punishable at common law (d).

It also forbids, under the same penalties, all transportation of any person furth of the kingdom, by judges, magistrates, or others, except by a lawful sentence, or with consent of the person himself, given before a judge.

If the magistrate be guilty of any abuse of power to the restraint of personal liberty, although not resembling any cases

(a) Hume, l. 481.

(c) Ibid. ii. 113.—Burnett, 386.

(b) Ibid. ii. 35.

(d) Hume, ii. 118.

in the liberation act, he is liable, at common law, to an action of damages for wrongous imprisonment.

See *Punishments*.

For imprisonment in civil cases, see *Imprisonment*.—*Mah-tatig Fugis Warrant*.—*Border Warrant*.

## ADDENDA.

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### BAIL.

(PAGE 37.)

The act 9 George II. c. 35, here quoted “(b)” has now been repealed by 6 Geo. IV. c. 105, in so far as regards customs; and by 7 and 8 Geo. III. c. 53, sect. 127, in so far as regards excise. And it has been enacted by sect. 40 of the last cited act, That if any person armed with any offensive weapon shall forcibly assault or resist any officer of excise or his assistants, when searching for, or seising any goods forfeited under any act relating to the *Excise or Customs*, or any vessel, boat, carriage, horse, &c. used in removing such goods, or when arresting or endeavouring to arrest any person concerned in carrying or concealing such goods, and liable to arrest, such officer, &c. may oppose force to force and execute his duty; and if any person so assaulting, resisting, or opposing, be wounded or killed, and the officer, &c. be prosecuted for it, they may plead the general issue, and give this act and the special matter in evidence; and any justice of the peace or other magistrate before whom such officer, &c. are brought, is to admit them to bail.

The common law applicable to such circumstances is noticed afterwards, *Homicide*, sect. Justifiable from public duty.

The circumstances of the case may be such as not to render it necessary to require bail. (See *Bail*.)

The acts 24 Geo. III. sess. 2, c. 47, and 47 Geo. III. sess. 2, c. 66, here quoted “(d)” have now been repealed by 6 Geo. IV. c. 105. But a similar provision has been made by the act at present in force with regard to the customs, 6 Geo. IV. c. 108, sect. 14, as is noticed under that head, page 188 “(a).”

## EXCISE AND CUSTOMS.

(PAGE 111.)

## I. EXCISE.

Since the corresponding part of this treatise was printed, an act of parliament has been passed to consolidate and amend the laws relating to the management of the Revenue of Excise (*a*); to take effect on 5th January 1828. That act contains various regulations upon the subject. But it does not repeal entirely all former laws, as was done in a distinct manner in the case of the customs. (See page 127.) It only enacts that former laws, powers, authorities, &c. contained in any former act, which are "repugnant to, or inconsistent with," the regulations in this act, are repealed; from which it may be inferred that the former laws and regulations, to which there are not corresponding provisions in this act, remain in force.

It is only intended to give here a very general outline of those provisions in the recent act, which more immediately concern justices of the peace, as the act is in the hands of the revenue officers, and will be produced when it is to be acted upon. Most of the remarks which were made with regard to the former regulations, now superseded, are of course applicable to the corresponding regulations made by the recent act.

(PAGE 111.)

1. *Forcible offences, for trial of which before higher courts justices may prepare.*

From the qualified terms of the repeal of former acts, as just noticed, and there being no corresponding provisions in the recent act, there seems to be ground for thinking that the former acts, relative to such forcible offences, quoted under this division in the body of this treatise, remain in force.

Certain offences of a forcible nature, more immediately connected with making of seizures, will be presently noticed under that division.

(PAGE 113.)

2. *Recovering penalties of excise before justices.*

The leading regulation upon this point is now contained in the recent act (*b*), which seems to supersede the more ancient

(*a*) 7 and 8 Geo. IV. c. 63.

(*b*) 18th act. 68.



regulation quoted in the text; but to which the remarks made in the text are in a great measure applicable. By that regulation, it is provided that, for the recovery of any penalty incurred for any offence against any act relating to the excise, or for the recovery of any goods seized as forfeited under any act relating to the excise, where the offence has been committed, or the offender has been found, or the goods have been seized beyond the limits of the chief office of excise in London, (which, of course, the whole of Scotland is) the information may be exhibited before any one or more justices of the peace for the county, city, town, or place where the offence was committed, or the offender was found, or the goods were seized, and may be determined by any two or more justices of the peace for the place. And they are required, upon such information being exhibited, and upon the appearance of the person against whom the information is exhibited, or who claims the goods, or, in default of appearance, upon proof of the service of such summons as after mentioned, to proceed to the examination of the facts, and to give judgment upon the examination of one or more credible witnesses upon oath, or upon voluntary confession; and they are required to grant a warrant under their hands, as after mentioned, for carrying the judgment into effect. And no information before justices of a county is objectionable, because the offence was committed, the offender found, or the goods seized, in a division, city, town, or place of such county, having a separate commission of the peace, whether it be a county of itself or not.

The information is to be laid within four months after the offence; and a notice, in writing, of such information is to be given to the defender within a week after. The justice or justices before whom the information is exhibited are required to summon the defender to appear and attend the hearing, at a time and place stated in the summons, which is to be served at least fourteen days before the time appointed, except in the case of information for recovery of double the value of any duty neglected to be paid, in which case the service must be at least twenty-four hours before the time appointed. And it is sufficient service to leave the summons at the place of business, or at the place where the offence was committed, or the seizure made, or at the place of residence, or with the wife, child, or menial servant, directed to the defender by his right name, or his assumed name (*a*).

Two or more justices are to meet every three calendar months, or oftener, to adjudge excise cases (*b*).

(*a*) 7 and 8 Geo. IV. c. 53, sect. 66.

(*b*) Sect. 67.

No officer of excise is to act as a justice in excise cases; nor any excise trader, in any excise case relating to his trade (*a*).

Persons incurring excise penalties may be prosecuted jointly or severally (*b*).

No action, bill, plaint, or information, or other legal proceeding, for the recovery of any penalty or forfeiture under the laws of excise or customs, is to be commenced or carried on in Scotland, unless by order of the commissioners or assistant commissioners of excise or customs, and in the name of an officer of excise or customs, or by and in the name of the Lord Advocate or Solicitor General. But this does not extend to summary proceedings at the instance of any officer of excise or customs, for the conviction upon immediate arrest of any person under any act relating to the excise or customs (*c*).

Justices are to proceed to hearing and judgment on the merits, without regard to defects in form (*d*).

Officers of excise and others detecting and giving information are competent witnesses, notwithstanding any interest in the penalty or forfeiture under prosecution (*e*).

Justices may mitigate penalties to one-fourth part thereof (*f*).

Penalties and forfeitures to be distributed equally between the King and the informer (*g*).

Appeal is competent to either party from the justices to the quarter-sessions, to be held not sooner than a week after notice of the appeal (*h*).

The appellant must immediately, upon the giving of the judgment to be appealed from, give notice in writing to the justices who pronounced it, and to the adverse party, and must lodge the notice with the clerk of the peace; and the appellant must, within one week at least before the appeal is to be heard, give notice in writing to the adverse party of the time and place at which the appeal is to be heard. Penalties to be paid within three days after the judgment appealed from to the commissioners of excise, collector or supervisor; and goods alleged to be forfeited to be deposited with them, until the appeal is disposed of (*i*).

The quarter-sessions to examine only the evidence before given; and in case of any new judgment, to have the like power of mitigation as the original justices (*j*).

(*a*) 7 and 8 Geo. IV. c. 53, sect. 68.

(*e*) Sect. 61.

(*f*) Sect. 78.

(*i*) Sect. 83.

(*d*) Sect. 73.

(*g*) Sect. 103.

(*j*) Sect. 84.

(*b*) Sect. 70.

(*e*) Sect. 75.

(*h*) Sect. 82.

If the judgment be affirmed on appeal, it is to be enforced by the original justices. If a new judgment be given on appeal, it is to be enforced by the quarter-sessions (*a*).

The justices or quarter-sessions respectively are to grant warrants for the sale of goods or levying of penalties (*b*).

In levy warrants, any time, not less than four, nor more than eight days, may be appointed for the sale of distress (*c*).

The penalty and the expences to be deducted from the sale, and the overplus returned. A copy of the warrant may be taken (*d*).

Where sufficient distress cannot be found, a warrant may issue for the arrest of the person, and commitment to the gaol or correction house till satisfaction (*e*). Poor persons may receive an allowance not exceeding eightpence per day, from the commissioners or assistant commissioners, out of the revenue of excise (*f*).

A fresh levy warrant may be issued when goods are found after the issue or execution of the arrest warrant (*g*).

Warrants to be executed in any part of the united kingdom, upon indorsement by a justice of the peace for the place in which they are to be executed (*h*).

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### 5. *Seizures of forfeited goods under the laws of excise.*

(1.) *Making of seizure.*—Goods forfeited under excise laws, may be seized by any officer of excise or his assistants (*i*).

Officers of excise and of customs to have similar powers of seizure, &c. of foreign goods, or of British spirits, forfeited under any laws of excise or customs (*j*).

Persons obstructing officers, &c. in making seizures, or rescuing the same, or destroying the packages, forfeit L.200 (*k*).

Officers, &c. violently resisted in making any seizure may oppose force to force; and upon being prosecuted are to be admitted to bail; and may plead the general issue (*l*). (See *Bail.—Homicide*, sect. Justifiable from public duty.)

Indictments or informations for assaulting officers may be tried in any county, and offenders convicted may be sentenced by the court to hard labour not exceeding three years (*m*).

(*a*) 7 and 8 Geo. IV. c. 53, sect. 85.

(*b*) Sect. 82.

(*c*) Sect. 113.

(*d*) Sect. 64.

(*e*) Sect. 40.

(*f*) Sect. 89.

(*g*) Sect. 91.

(*h*) Sect. 38.

(*i*) Sect. 43.

(*j*) Sect. 86, 87.

(*k*) Sect. 90.

(*l*) Sect. 92.

(*m*) Sect. 39.

Persons hindering officers in the due execution of their duty forfeit L.200 (a).

Persons found in any unentered place, concerned in manufacturing any goods liable to excise duties, may be conveyed by an excise officer, before a justice of the peace for the place who may convict on confession, or proof by one or more credible witnesses, in a penalty of L.30; and the person convicted must immediately pay that sum into the hands of the officer: and on his failure the justice is to grant warrant for committing him to the house of correction or gaol, for three calendar months from the date of conviction, or until payment; and for a second offence, the offender is liable in double the penalty, and to double the period of imprisonment (b).

Upon an officer making oath of suspicion, a justice may grant warrant to enter (if in the night, in the presence of a constable) and to seize forfeited goods lodged or concealed in any place (c).

Seizures of excisable goods by police-officers or peace-officers, to be lodged in an office of excise (d). If stopped, on suspicion of felony, to be lodged in the nearest police-office, and notice thereof to be given to the proper officer of excise, who is to be permitted to examine them (e). After the trial for the felony, the goods to be immediately deposited in an office of excise, to be dealt with according to law (f). Goods detained, if not so deposited, are forfeited; and the parties making default forfeit L.20 (g).

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(2.) *Condemnation of seizures.*—Jurisdiction with regard to seizures is conferred upon justices of the peace by the clauses by which jurisdiction, with regard to penalties, is conferred upon them, which has already been noticed.

Where no person appears to claim the goods seized (if beyond the limits of the chief office in London) the officer of excise who has made the seizure is to cause a notice, issued by a justice for the place, to whom information for condemnation has been exhibited, to be affixed on a conspicuous part of the outside of the office of excise next the place of seizure, during a market-day, not sooner than the seventh day after seizure,

(a) 7. and 8 Geo. IV. c. 53, sect. 24.

(c) Sect. 34.

(f) Sect. 110.

(d) Sect. 108.

(g) Sect. 111.

(b) Sect. 33.

(e) Sect. 109.

specifying the day (being any day after eight days from the notice) and the place where the matter is to be decided; and it is to be decided accordingly (a).

Certain detailed directions are given to the commissioners and assistant-commissioners of excise, for their proceedings upon the seizure of horses, or other cattle, or any other goods of a perishable nature (b).

Forfeitures, after condemnation (where no special directions are given) are to be sold publicly to the best bidder (c). No goods are to be sold for home consumption at less price than the amount of the duties; and if such prices be not offered, the goods are to be destroyed, or sold for exportation, or otherwise disposed of (d). Expenses attending forfeitures to be paid out of the gross proceeds of the sale thereof; or, if not sold, to be paid out of the revenue (e).

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#### *A. Complaints against Officers of Excise, &c.*

Complaints of overcharge with any duty of excise may be heard and determined by two justices of the peace within their respective jurisdictions. But no such complaint is to be heard unless a notice of the time and place of hearing (setting forth the substance of the complaint) be given to the collector or supervisor eight days at least before the time appointed: and the payment of duty, or proceedings for the recovery of it, are not to be delayed or suspended on account of such complaint having been made, or being depending (f).

Certain provisions are made for the protection of officers and their assistants, when prosecuted for their proceedings under the excise laws (g).

(a) 7 and 8 Geo. IV. c. 53, sect. 93.

(c) Sect. 100.

(f) Sect. 120.

(d) Sect. 101.

(g) Sect. 114, 115, 116, 117, 118, 119.

(b) Sect. 94.

(e) Sect. 102.

## POOR.

*(Page 372, Line 10.)*

Since the passage referred to was put to press, it has been decided that the sheriff has power to order the heritors and kirk-session to meet and consider an application for aliment; and that, if it be denied that the pauper has a legal settlement in the parish, the sheriff may previously investigate that matter; Orr against Heritors and Kirk-session of Glassford, 10th July 1827.

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